

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

27-RC-242382

Date Filed

5/30/2019

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer

Circle K Stores Inc

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)

4020 E 104th Avenue
CO Thornton 80241-

3a. Employer Representative - Name and Title

Parminder Hundal

3b. Address (If same as 2b - state same)

4020 E 104th Avenue
CO Thornton 80241-

3c. Tel. No.

(303) 452-2543

3d. Cell No.

3e. Fax No.

3f. E-Mail Address

str09844@circlek.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

Retail (Specialty)

4b. Principal product or service

Gasoline/Convenience store

5a. City and State where unit is located:

Thornton, CO

5b. Description of Unit Involved

Included: See Attached Page 2 for additional details

Excluded: See Attached Page 2 for additional details

6a. No. of Employees in Unit:

3

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☒ No ☐

Check One:



7a. Request for recognition as Bargaining Representative was made on (Date) 05/29/2019 and Employer declined recognition on or about _____ (Date) (If no reply received, so state). No reply received



7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).

8b. Address

8c. Tel No.

8d. Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____

(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: ☒ Manual ☐ Mail ☐ Mixed Manual/Mail

11b. Election Date(s):
June 12, 2019

11c. Election Time(s):
2:00-4:00 PM

11d. Election Location(s):
Store Location

12a. Full Name of Petitioner (including local name and number)

Randy Tiffey
United Food and Commercial Workers International Union, AFL-CIO, Local 7

12b. Address (street and number, city, state, and ZIP code)
7760 West 38th Avenue Suite 400
CO Wheat Ridge 80033-

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)

United Food and Commercial Workers International Union, AFL-CIO

12d. Tel No.

(303) 425-0897

12e. Cell No.

12f. Fax No.

12g. E-Mail Address

rtiffey@ufcw7.com

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title

Todd McNamara General Counsel
United Food and Commercial Workers Local 7

13b. Address (street and number, city, state, and ZIP code)

7760 West 38th Avenue
CO Wheat Ridge 80033-

13c. Tel No.

(303) 425-0897

13d. Cell No.

13e. Fax No.

13f. E-Mail Address

tmcnamara@ufcw7.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Randy Tiffey

Signature

Randy Tiffey

Title

Organizing Director

Date

05/29/2019 16:59:11

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

Employees Included

All full-time and regular part-time employees at the 104th Avenue location

Employees Excluded

Store Manager, Assistant Store Manager, all supervisors, guards, salaried, office/clerical, professional, temporary, and contracted employees as defined by the Act.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlr.gov
Telephone: (303)844-3551
Fax: (303)844-6249



Download
NLRB
Mobile App

May 30, 2019

URGENT

rtiffey@ufcw7.com

Randy Tiffey, Organizing Director
United Food and Commercial Workers
International Union, AFL-CIO, Local 7
7760 West 38th Avenue
Suite 400
Wheat Ridge, CO 80033

Re: Circle K Stores Inc
Case 27-RC-242382

Dear Mr. Tiffey:

The enclosed petition that you filed with the National Labor Relations Board (NLRB) has been assigned the above case number. This letter tells you how to contact the Board agent who will be handling this matter; explains your obligation to provide the originals of the showing of interest; notifies you of a hearing; describes the employer's obligation to post and distribute a Notice of Petition for Election, complete a Statement of Position and provide a voter list; requests that you provide certain information; notifies you of your right to be represented; and discusses some of our procedures including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Attorney ISABEL C. SAVELAND whose telephone number is (720)598-7416. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Assistant to the Regional Director KELLY SELVIDGE whose telephone number is (720)598-7389. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Showing of Interest: If the Showing of Interest you provided in support of your petition was submitted electronically or by fax, the original documents which constitute the Showing of Interest containing handwritten signatures must be delivered to the Regional office within **2 business days**. If the originals are not received within that time the Region will dismiss your petition.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:00 AM on Friday, June 7, 2019 at Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294**, if the parties do not voluntarily agree to an election.

If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, we will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party, the regional director may postpone the hearing for up to 2 business days upon a showing of special circumstances and for more than 2 business days upon a showing of extraordinary circumstances. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Posting and Distribution of Notice: The Employer must post the enclosed Notice of Petition for Election by **June 3, 2019** in conspicuous places, including all places where notices to employees are customarily posted. If it customarily communicates with its employees electronically, it must also distribute the notice electronically to them. The Employer must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Failure to post or distribute the notice may be grounds for setting aside the election if proper and timely objections are filed.

Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the Employer is required to complete the enclosed Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition by **noon Mountain Time on June 6, 2019**. The Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the Employer contends that the proposed unit is inappropriate, it must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The Employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Voter List: If an election is held in this matter, the Employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names and addresses of all eligible voters, including their shifts, job classifications, work locations, and other contact information including available personal email addresses and available personal home and cellular telephone numbers. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. When feasible, the list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the voter list with the Regional Office.

However, a petitioner and/or union entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483, which is available on the NLRB's website or from an NLRB office. A waiver will not be effective unless all parties who are entitled to the voter list agree to waive the same number of days.

Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) The correct name of the Union as stated in its constitution or bylaws.
- (b) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any employees in the petitioned-for unit.
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) The name and contact information for any other labor organization (union) claiming to represent or have an interest in any of the employees in the petitioned-for unit and for any employer who may be a joint employer of the employees in the proposed unit. Failure to disclose the existence of an interested party may delay the processing of the petition.

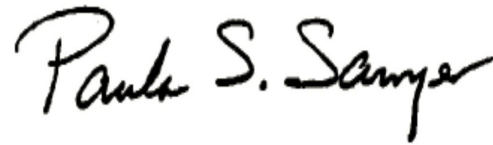
Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before the NLRB. In view of our policy of processing these cases expeditiously, if you wish to be represented, you should obtain representation promptly. Your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or from an NLRB office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was obtained only through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Also enclosed is a Description of Procedures in Certification and Decertification Cases (Form NLRB-4812). We strongly urge everyone to submit documents and other materials by E-Filing (not e-mailing) through our website, www.nlr.gov. On all your correspondence regarding the petition, please include the case name and number indicated above.

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in black ink that reads "Paula S. Sawyer". The signature is written in a cursive, flowing style.

PAULA SAWYER
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)

cc: Todd McNamara, General Counsel
United Food and Commercial Workers Local 7
7760 West 38th Avenue
Wheat Ridge, CO 80033



National Labor Relations Board



NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that United Food and Commercial Workers International Union, AFL-CIO, Local 7 has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 27-RC-242382 seeking an election to become certified as the representative of the employees of Circle K Stores Inc in the unit set forth below:

Included: All full-time and regular part-time employees at the 104th Avenue location.

Excluded: Store Manager, Assistant Store Manager, all supervisors, guards, salaried, office/clerical, professional, temporary, and contracted employees as defined by the Act.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlr.gov or contact the NLRB at (303)844-3551.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



National Labor Relations Board





UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27



Circle K Stores Inc Employer and United Food and Commercial Workers International Union, AFL-CIO, Local 7 Petitioner	Case 27-RC-242382
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NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 9:00 AM on **Friday, June 7, 2019** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located at Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Circle K Stores Inc must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Mountain time on **June 6, 2019**. The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Mountain on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: May 30, 2019

/s/ Paula Sawyer

PAULA SAWYER
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**DESCRIPTION OF REPRESENTATION CASE PROCEDURES
IN CERTIFICATION AND DECERTIFICATION CASES**

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlr.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews both the petition and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 8 days (excluding intervening federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position. Included with the Notice of Representation Hearing are a copy of the petition, this form, a Statement of Position form, a Notice of Petition for Election, and a letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request should be filed with the regional director. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. As part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department).

Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list

must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon on the business day before the opening of the hearing. The regional director may postpone the due date for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. The Statement of Position form may be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion."

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically if the employer customarily communicates with its employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; and eligibility formulas. At the hearing, the Statement of Position will be received into evidence and, prior to the introduction of further evidence, all other parties will respond on the record to each issue raised in the Statement. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made in the hearing room will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be filed only upon special permission of the regional director and within the

time and addressing the subjects permitted by the regional director. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. If allowed, briefs should be double-spaced on 8½ by 11 inch paper. Briefs must be filed in accordance with the provisions of Section 102.111(b) of the Board's Rules. E-Filing of briefs through the Board's website, www.nlr.gov, is encouraged, but not required. Facsimile transmission of briefs is NOT permitted.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 14 days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefore.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction.

To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You may E-File your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

Note: *Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to complete items 3, 5, 6, and 8a-8e of the form.*

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE

Case No. 27-RC-242382	Date Filed May 29, 2019
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INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.
Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position		1c. Business Phone:	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code)		1d. Cell No.:	1f. e-Mail Address
2. Do you agree that the NLRB has jurisdiction over the Employer in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)			
3. Do you agree that the proposed unit is appropriate? <input type="checkbox"/> Yes <input type="checkbox"/> No (If not, answer 3a and 3b.)			
a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)			
b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.			
Added		Excluded	
4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.			
5. Is there a bar to conducting an election in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, state the basis for your position.			
6. Describe all other issues you intend to raise at the pre-election hearing.			
The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015 . A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an appropriate unit. (Attachment D)			
State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: <input type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
8b. Date(s)	8c. Time(s)	8d. Location(s)	
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)	
9. Representative who will accept service of all papers for purposes of the representation proceeding			
9a. Full name and title of authorized representative		9b. Signature of authorized representative	9c. Date
9d. Address (Street and number, city, state, and ZIP code)			9e. e-Mail Address
9f. Business Phone No.:		9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME

CASE NUMBER

27-RC-242382

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)**2. TYPE OF ENTITY**☐ CORPORATION ☐ LLC ☐ LLP ☐ PARTNERSHIP ☐ SOLE PROPRIETORSHIP ☐ OTHER (Specify)**3. IF A CORPORATION or LLC**A. STATE OF INCORPORATION
OR FORMATION

B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS**5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR****6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).****7. A. PRINCIPAL LOCATION:****B. BRANCH LOCATIONS:****8. NUMBER OF PEOPLE PRESENTLY EMPLOYED**

A. Total:

B. At the address involved in this matter:

9. DURING THE MOST RECENT (Check appropriate box): ☐ CALENDAR YR ☐ 12 MONTHS or ☐ FISCAL YR (FY dates)

YES NO

A. Did you **provide services** valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value.
\$B. If you answered no to 9A, did you **provide services** valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided.
\$C. If you answered no to 9A and 9B, did you **provide services** valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$D. Did you **sell goods** valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$E. If you answered no to 9D, did you **sell goods** valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount.
\$F. Did you **purchase and receive goods** valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$G. Did you **purchase and receive goods** valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$H. **Gross Revenues** from all sales or performance of services (**Check the largest amount**):☐ \$100,000 ☐ \$250,000 ☐ \$500,000 ☐ \$1,000,000 or more If less than \$100,000, indicate amount.I. **Did you begin operations within the last 12 months?** If yes, specify date: _____**10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?**☐ YES ☐ NO (If yes, name and address of association or group).**11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS**

NAME

TITLE

E-MAIL ADDRESS

TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)

SIGNATURE

E-MAIL ADDRESS

DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249



Download
NLRB
Mobile App

May 30, 2019

URGENT

str09844@circlek.com
Parminder Hundal, Manager
Circle K Stores Inc
4020 E 104th Avenue
Thornton, CO 80241

Re: Circle K Stores Inc
Case 27-RC-242382

Dear Mr. Hundal:

Enclosed is a copy of a petition that United Food and Commercial Workers International Union, AFL-CIO, Local 7 filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures.

Investigator: This petition will be investigated by Field Attorney ISABEL C. SAVELAND whose telephone number is (720)598-7416. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Assistant to the Regional Director KELLY SELVIDGE whose telephone number is (720)598-7389. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by **June 3, 2019** in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate with your employees electronically, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Mountain Time on June 6, 2019**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form may be e-Filed, but unlike other e-Filed documents, will *not* be timely if filed on the due date but after noon Mountain Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the

appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:00 AM on Friday, June 7, 2019 at Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party, the regional director may postpone the hearing for up to 2 business days upon a showing of special circumstances and for more than 2 business days upon a showing of extraordinary circumstances. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);
- (b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) If you desire a formal check of the showing of interest, you must provide an alphabetized payroll list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a payroll list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. When feasible, the list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

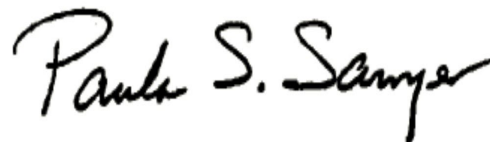
Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Also enclosed is a Description of Procedures in Certification and Decertification Cases (Form NLRB-4812). We strongly urge everyone to submit documents and other materials by E-Filing (not e-mailing) through our website, www.nlr.gov. E-Filing your documents places those documents in our official electronic case files. On all your correspondence regarding the petition, please include the case name and number indicated above.

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in black ink that reads "Paula S. Sawyer". The signature is written in a cursive, flowing style.

PAULA SAWYER
Regional Director

Enclosures

1. Petition

2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

United Food and Commercial Workers International Union,
Local 7,

Petitioner

and

Circle K Stores, Inc.,

Respondent

CASE 27-RC-242382

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____
United Food and Commercial Workers, Local 7

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

☒ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: Mathew S. Shechter

MAILING ADDRESS: 1888 Sherman Street, Suite 370

E-MAIL ADDRESS: mss@18thavelaw.com

OFFICE TELEPHONE NUMBER: (303) 333-8700

CELL PHONE NUMBER: (303) 521-7010

FAX: _____

SIGNATURE: _____
(Please sign in ink.)

DATE: _____

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.



**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**



Circle K Stores Inc Employer and United Food and Commercial Workers International Union, AFL-CIO, Local 7 Petitioner	Case 27-RC-242382
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SECOND NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 9:00 AM on **Friday, July 19, 2019** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located at Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Circle K Stores Inc must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Mountain time on **July 18, 2019**. The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Mountain on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: July 11, 2019

/s/ Paula Sawyer

PAULA SAWYER
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294



United States of America
National Labor Relations Board
NOTICE OF ELECTION



PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.



**United States of America
National Labor Relations Board
NOTICE OF ELECTION**



VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full-time and regular part-time customer service representatives and lead customer service representatives employed by the Employer at its Store No. 2709844, which is located at 4020 E. 104th Ave., Thornton, Colorado 80241, who were employed by the Employer during the payroll period ending July 12, 2019.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: Store managers, assistant store managers, office clerical employees, professional employees, contracted employees, temporary employees, salaried employees, guards and supervisors, as defined in the Act.

DATE, TIME AND PLACE OF ELECTION



Wednesday, July 31, 2019	1:30 p.m. - 5:30 p.m.	In Store Room located in Store No. 2709844 at 4020 E. 104th Ave., Thornton, CO 80241
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**United States of America
National Labor Relations Board
NOTICE OF ELECTION**



EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

	<p>UNITED STATES OF AMERICA National Labor Relations Board 27-RC-242382</p> <p>OFFICIAL SECRET BALLOT</p> <p>For certain employees of CIRCLE K STORES, INC.</p>	
<p>Do you wish to be represented for purposes of collective bargaining by UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 7, AFL-CIO?</p>		
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>		
<p>YES</p> <div data-bbox="418 1102 555 1207"><input type="checkbox"/></div>	<p>NO</p> <div data-bbox="1068 1075 1205 1207"><input type="checkbox"/></div>	
<p>DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		



United States of America
National Labor Relations Board
NOTICE OF ELECTION



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (303)844-3551 or visit the NLRB website www.nlrb.gov for assistance.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

Circle K Stores, Inc.

Case 27-RC-242382

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The Employer, a Texas corporation, operates a gas station and convenience store located at 4020 East 104th Ave., Thornton, Colorado, the sole facility involved herein. During the year ending December 31, 2018, a representative period, the Employer derived gross revenue in excess of \$500,000 and purchased and received goods and services at its Thornton, Colorado location valued in excess of \$5,000 directly from points outside the state of Colorado.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

DATE: Wednesday, July 31, 2019 **HOURS:** 1:30 p.m. to 5:30 p.m.

PLACE: In Store Room located in Store No. 2709844 at 4020 E. 104th Ave.,
Thornton, CO 80241

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time customer service representatives and lead customer service representatives employed by the Employer at its Store No. 2709844, which is located at 4020 E. 104th Ave., Thornton, Colorado 80241.

Excluded: Store managers, assistant store managers, office clerical employees, professional employees, contracted employees, temporary employees, salaried employees, guards and supervisors, as defined in the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending July 12, 2019**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Initials: 

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls or by mail as described above in paragraph 4.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by United Food & Commercial Workers Union, Local 7, AFL-CIO?" The choices on the ballot will be "Yes" or "No".

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

9. NOTICE OF ELECTION ONSITE REPRESENTATIVE. The following individual will serve as the Employer's designated Notice of Election onsite representative: Carol Grenawalt, Store No. 2709844, 4020 E. 104th Ave., Thornton, CO 80233; Phone: 303-452-254; Email: cgrenawa@circlek.com.

10. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps

Initials: 

falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

11. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.


12. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

13. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

Circle K Stores, Inc.

(Employer)

By


(Name)

7/15/19
(Date)

Grant T. Reuss
Attorney for Employer

United Food & Commercial Workers Union,
Local 7, AFL-CIO

(Petitioner)

By

/s/ Randy Tiffey 7/15/19
Organizing Director

(Name)

(Date)

Recommended: /s/ Stephanie Stroup Scaffidi 7/15/19

STEPHANIE STROUP SCAFFIDI

Field Examiner

Date approved:

7/16/19


Regional Director, NLRB, Region 27

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO. 7,**

Re: Case No. 27-RC-242382

CIRCLE K STORES, Inc.,

Respondent.

United Food and Commercial Workers, Local 7, the Petitioner, objects to conduct by Circle K Stores, Inc., the Employer, which affected the results of the election which was held on July 31, 2019. Generally, Employer's conduct created an atmosphere of intimidation, fear, improper inducement, and misinformation. More particularly, the reduction of scheduled hours for two Circle K employees closely associated with the Union's efforts to organize the small workforce had its intended effect upon the voting workforce. In addition, the Employer selected as its observer, over the objection of the Petitioner, the Company's Tobacco Manager, who was closely identified with management. Further, Employer conducted a mandatory meeting with employees featuring a "quiz" about Union efforts to organize, with a four hundred and fifty dollar (\$450.00) gift card to the highest score.

Specifically, Employer engaged in the following objectionable conduct:

1. On or about June 6, the Employer reduced the scheduled hours of Amber Garrison and Dena Olsen (see 2) for protected, concerted activity and/or being closely associated with the Petitioner's organizing efforts. The Employer was aware Garrison was a key employee organizer for the campaign. The Employer reduced the scheduled hours Garrison worked without Garrison's request. The Employer's store normally employed three (3) full-time employees. By the time of the July 31, 2019 election date, the store employed three (3) full-time employees and an additional three (3) temporary part-time employees. While reducing the hours of both pro-union employees from 40 hours per week to 32 hours per week, the Employer did not reduce the hours of the third full-time employee, Jillian Wilson. The effect of the Employer reducing Garrison's

hours and hiring part-time employees was to create an atmosphere of fear and intimidation and to dissuade employees from voting for Petitioner.

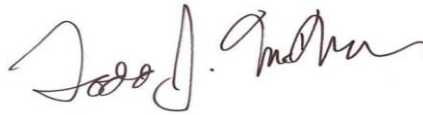
2. On or about June 6, 2019, Employer reduced the scheduled hours of Dena Olsen for protected, concerted activity and/or being closely associated with the Petitioner's organizing efforts. The Employer was aware Olsen was a key employee organizer for the campaign. The Employer reduced the scheduled hours Olsen worked without Olsen's request. The Employer's store normally employed three (3) full-time employees. By the time of the July 31, 2019 election date, the store employed three (3) full-time employees and an additional three (3) temporary part-time employees. While reducing the hours of both pro-union employees from approximately 40 hours per week to approximately 32 hours per week, the Employer did not reduce the hours of the third full-time employee, Jillian Wilson. The effect of the Employer reducing Olsen's hours and hiring part-time employees was to create an atmosphere of fear and intimidation and to dissuade employees from voting for Petitioner.

3. On July 15, 2019, sixteen (16) days prior to the Election, the Employer identified Carol Grenawalt, a Product Specialist, as its observer at the pre-conference hearing. On July 31, 2019, the day of the election, the Employer identified Lali Dhillon as its observer over the objection of the Petitioner at the prehearing conference. Dhillon, who regularly secures sign offs from employees on numerous items, is closely identified with management. Dhillon's status as an observer had the effect of intimidating employees and skewing the election in the Employer's favor. Moreover, as an individual closely identified with management, Dhillon's selection as observer was a per se violation of laboratory conditions requiring the election to be set aside. *In re Mid Continent Spring Co.*, 273 N.L.R.B. 884 (1984).

4. On July 29, 2019, two days prior to the Election, the Employer held a mandatory meeting with employees. During this meeting, the Employer gave a "Union Quiz" to employees featuring questions about the Petitioner's effort to organize. The Employer gave a four hundred and fifty dollar (\$450.00) gift card to the employee with the most "correct" answers. The Board still will scrutinize an objected-to raffle, and set aside an election, if the raffle "involve[s] promises or grants of benefit that would improperly affect employee free choice; or... allow[s] the employer to identify employees who might or might not be sympathetic, and thus to learn where to direct additional pressure or campaign efforts." *Atlantic Limousine*, 331 NLRB 1025, 165 LRRM 1001. *See also* BFI Waste Sys., 334 NLRB 934, 174 LRRM (2001). The subject matter of the Union Quiz, the disproportionate reward, which is roughly one week's salary for most Circle K employees, and the mandatory attendance promoted an atmosphere which could reasonable have dissuaded employees from voting for Petitioner.

By these acts, the cumulative impact of the Employer's actions were to intentionally and negatively impact the results of the election. Further investigation may also reveal additional instances of Employer misconduct. Therefore, Petitioner request that the election be set aside and a new election be ordered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Todd J. McNamara". The signature is fluid and cursive, with the first name "Todd" being more legible than the last name "McNamara".

Todd J. McNamara
General Counsel
UFCW Local 7
7760 W. 38th Ave.
Wheat Ridge, CO 80033

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2019, I served a true and accurate copy of the foregoing Objections to Conduct Affecting Result of Election by E-mail to the following:

Parminder Hundal
Circle K Stores, Inc.
4020 E. 104th Avenue
Thornton, CO 80241
Str09844@circlek.com

Grant T. Pecor, Esq.
Clark Hill PLC
200 Ottawa Ave NW Ste 500
Grand Rapids, MI 49503-2405
gpecor@clarkhill.com

/s/ Todd McNamara

Todd McNamara
General Counsel
UFCW Local 7
7760 W. 38th Ave.
Wheat Ridge, CO 80033

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed

May 29, 2019

Case No. 27-RC-242382

Date Issued 07/31/2019

City Thornton

State CO

Type of Election:
(Check one:)

(If applicable check
either or both:)

☒ Stipulation

☐ 8(b) (7)

☐ Board Direction

☐ Mail Ballot

☐ Consent Agreement

☐ RD Direction
Incumbent Union (Code)

Circle K Stores, Inc.
Employer

and

United Food & Commercial Workers Union, Local 7, AFL-CIO
Petitioner

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 60
2. Number of Void ballots 0
3. Number of Votes cast for Petitioner 2
4. Number of Votes cast for 1
5. Number of Votes cast for 1
6. Number of Votes cast against participating labor organization(s) 2
7. Number of Valid votes counted (sum 3, 4, 5, and 6) 4
8. Number of challenged ballots 2
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 6
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for Petitioner.

Undetermined

For the Regional Director

[Signature]

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Petitioner

[Signature]

For Employer

[Signature]

For

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO. 7,**

Re: Case No. 27-RC-242382

CIRCLE K STORES, Inc.,

Respondent.

United Food and Commercial Workers, Local 7, the Petitioner, objects to conduct by Circle K Stores, Inc., the Employer, which affected the results of the election which was held on July 31, 2019. Generally, Employer's conduct created an atmosphere of intimidation, fear, improper inducement, and misinformation. More particularly, the reduction of scheduled hours for two Circle K employees closely associated with the Union's efforts to organize the small workforce had its intended effect upon the voting workforce. In addition, the Employer selected as its observer, over the objection of the Petitioner, the Company's Tobacco Manager, who was closely identified with management. Further, Employer conducted a mandatory meeting with employees featuring a "quiz" about Union efforts to organize, with a four hundred and fifty dollar (\$450.00) gift card to the highest score.

Specifically, Employer engaged in the following objectionable conduct:

1. On or about June 6, the Employer reduced the scheduled hours of Amber Garrison and Dena Olsen (see 2) for protected, concerted activity and/or being closely associated with the Petitioner's organizing efforts. The Employer was aware Garrison was a key employee organizer for the campaign. The Employer reduced the scheduled hours Garrison worked without Garrison's request. The Employer's store normally employed three (3) full-time employees. By the time of the July 31, 2019 election date, the store employed three (3) full-time employees and an additional three (3) temporary part-time employees. While reducing the hours of both pro-union employees from 40 hours per week to 32 hours per week, the Employer did not reduce the hours of the third full-time employee, Jillian Wilson. The effect of the Employer reducing Garrison's

hours and hiring part-time employees was to create an atmosphere of fear and intimidation and to dissuade employees from voting for Petitioner.

2. On or about June 6, 2019, Employer reduced the scheduled hours of Dena Olsen for protected, concerted activity and/or being closely associated with the Petitioner's organizing efforts. The Employer was aware Olsen was a key employee organizer for the campaign. The Employer reduced the scheduled hours Olsen worked without Olsen's request. The Employer's store normally employed three (3) full-time employees. By the time of the July 31, 2019 election date, the store employed three (3) full-time employees and an additional three (3) temporary part-time employees. While reducing the hours of both pro-union employees from approximately 40 hours per week to approximately 32 hours per week, the Employer did not reduce the hours of the third full-time employee, Jillian Wilson. The effect of the Employer reducing Olsen's hours and hiring part-time employees was to create an atmosphere of fear and intimidation and to dissuade employees from voting for Petitioner.

3. On July 15, 2019, sixteen (16) days prior to the Election, the Employer identified Tom Fitzgerald, a Product Specialist, as its observer at the pre-conference hearing. On July 31, 2019, the day of the election, the Employer identified Lali Dhillon as its observer over the objection of the Petitioner at the prehearing conference. Dhillon, who regularly secures sign offs from employees on numerous items, is closely identified with management. Dhillon's status as an observer had the effect of intimidating employees and skewing the election in the Employer's favor. Moreover, as an individual closely identified with management, Dhillon's selection as observer was a per se violation of laboratory conditions requiring the election to be set aside. *In re Mid Continent Spring Co.*, 273 N.L.R.B. 884 (1984).

4. On July 29, 2019, two days prior to the Election, the Employer held a mandatory meeting with employees. During this meeting, the Employer gave a "Union Quiz" to employees featuring questions about the Petitioner's effort to organize. The Employer gave a four hundred and fifty dollar (\$450.00) gift card to the employee with the most "correct" answers. The Board still will scrutinize an objected-to raffle, and set aside an election, if the raffle "involve[s] promises or grants of benefit that would improperly affect employee free choice; or... allow[s] the employer to identify employees who might or might not be sympathetic, and thus to learn where to direct additional pressure or campaign efforts." *Atlantic Limousine*, 331 NLRB 1025, 165 LRRM 1001. *See also* BFI Waste Sys., 334 NLRB 934, 174 LRRM (2001). The subject matter of the Union Quiz, the disproportionate reward, which is roughly one week's salary for most Circle K employees, and the mandatory attendance promoted an atmosphere which could reasonable have dissuaded employees from voting for Petitioner.

By these acts, the cumulative impact of the Employer's actions were to intentionally and negatively impact the results of the election. Further investigation may also reveal additional instances of Employer misconduct. Therefore, Petitioner request that the election be set aside and a new election be ordered.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Todd J. McNamara". The signature is fluid and cursive, with the first name "Todd" being more prominent and the last name "McNamara" written in a more compact, flowing style.

Todd J. McNamara
General Counsel
UFCW Local 7
7760 W. 38th Ave.
Wheat Ridge, CO 80033

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2019, I served a true and accurate copy of the foregoing Amended Objections to Conduct Affecting Result of Election by E-mail to the following:

Parminder Hundal
Circle K Stores, Inc.
4020 E. 104th Avenue
Thornton, CO 80241
Str09844@circlek.com

Grant T. Pecor, Esq.
Clark Hill PLC
200 Ottawa Ave NW Ste 500
Grand Rapids, MI 49503-2405
gpecor@clarkhill.com

s/ Todd McNamara

Todd McNamara
General Counsel
UFCW Local 7
7760 W. 38th Ave.
Wheat Ridge, CO 80033

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

United Food and Commercial Workers
Union, Local No. 7

Petitioner

and

Circle K Stores, Inc.

Respondent

CASE 27-RC-242382

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

Respondent Circle K Stores, Inc.


IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

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(REPRESENTATIVE INFORMATION)

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SIGNATURE: 
DATE: (Please sign in ink.) 8/7/19

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO. 7,**

Petitioner,

and

CIRCLE K STORES, INC.

Respondent.

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Re: Case No. 27-RC-242382

UNOPPOSED MOTION TO CONTINUE HEARING

Petitioner United Food and Commercial Workers Union, Local No. 7 (“Union”), pursuant to Rule 102.16 of the Rules and Regulations of the National Labor Relations Board (“NLRB”), and §11365.3 and §11427 of the National Labor Relations Board Case Handling Manual, moves for a continuance of the hearing in the above-captioned matter. As grounds thereof, Petitioner states as follows:

1. On October 21, 2019, the undersigned received the **Order Approving Withdrawal of Certain Amended Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Amended Objections.**
2. By the above-referenced Order this matter was set for hearing October 29, 2019.
3. Virtually all of the Union’s key witnesses will be out of state during the week of October 28, attending the United Food and Commercial Workers’ Retail Conference.

This national conference was booked months ago by key Union witnesses, including

the Director of Organizing, and Union Organizers, Chris Lopez and Jimena Santiago, as well as Associate General Counsel Tyler Reese. All room reservations and airfare are non-refundable.

4. Requiring the hearing to go forward on the 29th would create grave injustice and serious prejudice to the Union – as it is faced with the hobson's choice of preceding without its key witnesses, which makes presentation of a case virtually impossible, or, alternatively, face the loss of thousands of dollars in non-refundable airfare and hotel reservations.
5. The undersigned has contacted counsel for Circle K Stores, Inc. (Circle K), Grant Pecor, Esq. of Clark Hill, PLC, who has graciously indicated that Circle K has no objection to a continuance of the hearing, *as long as* the hearing is not reset *before* November 21, 2019.
6. Local 7 is available for a hearing on November 21, 2019, and if necessary on November 22, 2019, or it will make itself available for alternate dates, after November 21, 2019 which are acceptable to counsel for Circle K.
7. At present the undersigned does not believe that the hearing will last more than one full day, such that it could be heard and completed on the 21st. Given the circumstances of the attendance of key Local 7 witnesses at a longstanding national conference, and the loss of thousands of dollars if the hearing were to proceed on October 29, 2019, the good cause requirement noted in the NLRB Case Handling Manual §11395.4, good cause, has more than been amply demonstrated.
8. There will be no prejudice to either the Union or Circle K Stores as a result of this continuance.

WHEREFORE, Petitioner United Food and Commercial Workers Union, Local 7 respectfully requests that the NLRB postpone the hearing in this matter until November 21, 2019, or to some other acceptable date after November 21, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October 22, 2019, I served a true and accurate copy of the foregoing Motion for Continuance of Hearing regarding UFCW Local 7, Petitioner, and Circle K Stores, Inc., Respondent, in Case No. 27-RC- 242382 by E-Filing the same to the Regional Director of the NLRB, Region 27, and emailing the same to counsel for the Respondent as follows:

Paula Sawyer
Regional Director, NLRB
National Labor Relations Board, Region 27
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1961 Stout Street – Suite 13-103
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s/ Carla Wyatt
Carla Wyatt, Legal Secretary

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

CIRCLE K STORES, INC.

Employer

and

Case 27-RC-242382

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO**

Petitioner

**ORDER RESCHEDULING HEARING ON
CHALLENGED BALLOTS AND AMENDED OBJECTIONS**

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from at 9:00 AM on Tuesday, October 29, 2019 to 9:00 AM on **Thursday, November 21, 2019** at Hearing Room at the Byron Rogers Federal Building at 1961 Stout St, Ste 13-103, Denver, CO 80294. The hearing will continue on consecutive days until concluded.

Dated: October 24, 2019

/s/ Paula Sawyer

PAULA SAWYER
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

Circle K Stores, Inc.,

Employer,

Case 27-RC-242382

and

United Food and Commercial Workers Union, Local 7,

Petitioner.

Petitioner's Post-Hearing Brief

Petitioner United Food and Commercial Workers Union, Local 7 (“Local 7” or the “Union”), through its undersigned counsel, hereby submits the following Post-Hearing Brief, following the objections and challenged ballots hearing in this matter that was conducted on November 21, 2019.

1. Overview

In a transparent attempt to influence the free and fair choice of voters, Circle K sought to manipulate the election process in order to ensure maximum influence on voters during the voting session by selecting as its observer an individual closely affiliated with management, bringing in additional employees directly after learning that the Union wanted to organize the store, and holding a farcical anti-Union raffle for a prize that amounted to 1-2 weeks of pay for employees. As set forth below in detail, the Petitioner’s Objection No. 3, filed and amended on August 7, 2019 (the “Objections”), alleges that the Employer chose an individual closely affiliated with management as their election observer. Further, the Petitioner challenged the

ballots of two employees temporarily transferred to the store in question and alleges that these employees should not have been eligible to vote in the election. Finally, the Petitioner's Objection No. 4 alleges that the Employer held an illegal raffle for an exorbitant amount of money before the election in an attempt to sway the election in favor the Employer.

The record evidence is straight forward and simple. The Employer identified Tom Fitzgerald ("Fitzgerald") as their designated observer during the pre-election conference. The Union's designated observer objected to Fitzgerald's designation as observer for his role as a member of management. However, July 31, 2019, the day of the election, the Employer identified Lali Dhillon ("Dhillon") as its observer over the objection of the Petitioner at the prehearing conference. As the evidence shows, Dhillon is closely identified with management.

Furthermore, the challenged ballots should not be opened and counted, as both employees were transferred temporarily from another store during their store's remodeling. Prior to the Union organizing effort, Circle K 9844 employed 2-3 full-time employees. However, once the Union organizing effort began and the Employer caught wind of the effort, two additional full-time employees were immediately transferred to store 9844 for a total of five full-time workers. The testimony of the Company's witness Craig Holmes ("Holmes") alleges that these two employees were permanently transferred to store 9844. However, to credit Holmes' testimony, one would have to believe that store 9844 developed a burning need for additional personnel only after the union election campaign started, which strains one's credulity to the utmost. These transferred employees, as a result of their temporary status, should not have been allowed to vote in the Election and their ballots should not be opened.

Finally, barely 24 hours prior to the Election, the Employer held a mandatory meeting with employees regarding the Union organizing effort. During this meeting, the Employer gave a

“Union Quiz” to employees featuring questions about the Petitioner’s effort to organize. A raffle ticket was included for a “perfect” score. These raffle tickets were placed in and drawn from a box, and the winner received a \$450.00 Visa gift card (or about 1-2 weeks of pay for a Circle K employee). The evidence is clear that this quiz and raffle was *a direct* result of the Union organizing effort and no other similar quizzes or raffles took place in the Mountain division of Circle K stores. Even more telling, the eye popping amount of prize money was clearly an effort by the Employer to improperly influence the vote.

As a result of the totality of evidence of the Employer’s violations before and during the Election, the Regional Director should sustain the Objections and Challenges and issue appropriate remedial relief, up to and including a remedial bargaining order.

2. Standard of Review

The Regional Director’s consideration of the Objections is limited to activity that is alleged to have occurred between the petition filing date and the election date. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). In examining whether the Objections, as alleged, are sufficient to overturn the results of an election, the Board has held that,

[t]he test, an objective one, is whether the conduct of a party to an election has the tendency to interfere with the employees’ freedom of choice. In making its determination as to whether the conduct has the tendency to interfere with employees’ freedom of choice, the Board will consider, *inter alia*, the closeness of the election.

Cambridge Tool & Mfg Co., 316 NLRB 716, 716 (1995). The results in this election were 2-2 with 2 unopened challenged ballots. *See* Order Directing Hearing and Notice of Hearing on Objections, dated October 24, 2018 (the “Notice”), at 1. Because of both the nature of the objections, as well as the proximity to the casting of ballots at which the objectionable conduct occurred, these matters had a significant opportunity to affect the outcome of the election.

In deciding whether employees have freely and fairly exercised their choice in a representation election, the Board takes into account the following factors:

- (1) the number of incidents of misconduct;
- (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit;
- (3) the number of employees in the bargaining unit subjected to the misconduct
- (4) the proximity of the misconduct to the election date;
- (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees;
- (6) the extent of discrimination of the misconduct among the bargaining unit employees;
- (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct;
- (8) the closeness of the final vote; and
- (9) the degree to which the misconduct can be attributed to the party.

Avis Rent-A-Car System, 280 NLRB 580, 581 (1986) (citations omitted).

The above factors are damning for the Employer's case. As described below, the evidence shows objectionable conduct just slightly more than 24 hours prior to the election, in a small voting unit of just four employees – given that, considering the challenged ballots, even the swing of a single ballot could have affected the outcome of the election, the factors weigh heavily in favor of a finding of objectionable conduct.

3. Objection No. 3: Employer Election Observer

The Petitioner's objection alleges that the employer selected as its observer an individual closely affiliated with management. As the Board has explained, the use of an observer [closely identified with management] is such a fundamental derivation from the Board's rules, that it requires an election to be set aside. *In re Mid-Continent Spring Co.*, 273 NLRB 884 (1985).

Mid-Continent Spring is also an instructive case on these facts. In *Mid-Continent Spring*, the Union failed to establish that the employer's observer met *any* of the elements as set forth under Section 2(11) of the Act to establish a statutory supervisor. Indeed, although Circle K went to great lengths to make clear that its observer, Lali Dhillon ("Dhillon"), held none of the requisite roles concerning the hiring, firing, or discipline of employees, no such showing was made in *Mid-Continent Spring*. Instead, the critical factor was that the employee voters perceived the observer as closely affiliated with management. *See also First Student, Inc.*, 355 NLRB 410 (2010) (ordering new election where employees could have reasonably perceived Employer's observer as being closely affiliated with management).

As the record makes clear, the best evidence concerning Dhillon's status came from the pre-election conference.

Q BY MR. REESE: So you mentioned that Mr. Fitzgerald was -- was identified as the observer. Did that ever change?

A Yes, it did.

Q When did that change?

A The day of the election when we went in for the pre-election there was a different gentleman there.

Q Did you bring that up with anyone from the NLRB?

A Yes, I brought it up with Ms. Stephanie Scaffidi who was the NLRB agent that was assigned to the election.

Q Did you raise a formal objection?

A Yes, I did.

Q And what did she say to that?

A She raised issue to the company and had cautioned them and also had asked if they had anybody else and they had indicated no and they were fine with what they -- using this gentleman.

Q To your knowledge -- excuse me. Was it ever conveyed what his position was at the company?

A He indicated that he was a manager and he was -- had a similar position that of Tom Fitzgerald.

Testimony of Randy Tiffey, November 21, 2019 Hearing Transcript at 15:17-16:10.

This testimony from Tiffey was unrebutted by the Employer. While Dhillon's testimony was unrebutted, it seems rather convenient that the Employer changed from their previously

named observer to Dhillon, relying on “the luck of the draw” to identify someone high in the corporate structure of Circle K.

Q BY MR. MCNAMARA: Mr. Dhillon, how'd you happened to get picked to be observer? Luck of the draw?

A Luck of the draw. Yes.

Testimony of Lali Dhillon, November 21, 2019 Hearing Transcript at 64:02-64:04.

4. Challenged Ballots

The Petitioner challenged the ballots of two employees temporarily assigned to the Circle K 9844 while their store underwent renovations. Employees hired for specific jobs at places other than their principal place of employment are essentially temporary employees. *In re Burnup & Sims, Inc.*, 95 NLRB 113 (1951). Temporary employees do not possess sufficient interests in common with an employer’s regular employees to justify inclusion into a bargaining unit. *Id.*

The two transferred employees are clearly temporary employees as the evidence shows.

Q BY MR. REESE: So you spoke to Myra at her store. What store was that?

A It was in Thornton. I'm not exactly sure of the address.

Q Why did you speak to her?

A Because we became aware that she was not a permanent employee at that location.

Q This was at the Thornton store in question on 104th in Colorado?

A I believe so, yes.

Q What -- why did -- what made you -- or how did you become aware that she was a temporary employee?

A I became aware from my director and my coworker.

Testimony of Jimena Santiago Garcia, November 21, 2019 Hearing Transcript at 21:04-21:15.

Employee eligibility to vote in an election hinges on the employee's status at the time of the election. *See* 10:11-10:14 of Hearing Transcript. As a general rule, an employee is eligible to vote in a representation election if he or she is employed in the bargaining unit during the eligibility period and on the date of the election. *St. Elizabeth Community Hosp. v. NLRB.*, 708 F.2d 1436, 1444 (9th Cir.1983). The Board has employed two tests, the date certain test and the reasonable expectation test, in determining whether a temporary employee who is employed at the time of the election eligibility date and the election is entitled to vote in a representation election. Compare *Apex Paper Box Co.*, 302 NLRB. 67, 68 (1991) (date certain test), with *Pen Mar Packaging Corp.*, 261 NLRB. 874, 874 (1982) (reasonable expectation test). Under the date certain test, a temporary employee is eligible to vote in a representation election so long as her tenure of employment remains uncertain, while an employee who has been given a date certain for termination of her employment is not. *See NLRB v. New England Lithographic*, 589 F.2d 29, 32 (1st Cir.1978). Under the reasonable expectation test, an employee is eligible to vote if she has a reasonable expectation of continued employment. *Id.*

In the instant case, the transferred employees fail both eligibility tests. First, while there is no date certain for finishing remodeling of their former store, the Board explains in *Caribbean Communications Corp., d/b/a St. Thomas-St. John Cable TV*, 309 NLRB 106 (1992), that the date certain test does not require a party contesting an employee's eligibility to prove that the

employee's tenure was certain to expire on an exact date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment. Even though the opening date of their former store was pushed back to December 7th (*See* Hearing Transcript 48:11-48:12), the opening of the store was sufficiently finite to demonstrate that continued employment at store 9844 was certain to expire.

The transferred employees also fail the reasonable expectation test. The Employer temporarily transferred the two employees after closing their store:

Q BY MR. PECOR Okay. And for example, did you talk to Linda Longstrom and Myra Canales regarding their move from store 4095 to store 9844?

A I did, and I instructed them both that that was their new location.

Testimony of Craig Holmes, November 21, 2019 Hearing Transcript at 47:08-47:12

As the evidence shows, this was an *instruction* to transfer to store 9844. The two employees had no choice but to move to store 9844. However, when discussing a return to their original store, the Employer makes it clear that the burden is now on the *employees* to transfer back to their original store.

Q BY MR. PECOR Okay. And are there any plans for either Linda Longstrom or Myra Canales to -- and I apologize to both individuals if I'm butchering their names, but are there any plans for those individuals to move to that store?

A No. They have not requested a move back at this time, in our transfer process. And we have already hired 15 people and three managers for that store.

After the Employer *instructed* employees to transfer stores during the remodeling of their store, one may draw a reasonable expectation that the Employer will again *instruct* the employees to return to their store once renovation is completed. It's *unreasonable* to assume the employees realize the burden to request a transfer to their *original* store is now thrust upon them after previously being instructed to move stores temporarily.

Both transferred employees were sent from another store *directly* prior to the election. Conveniently yet unsurprisingly, the Employer has decided to make their transfer to store 9844 permanent. However, as shown, their current status does not matter, only their status at the time of the election. At the time of the election, both transferred employees were at store 9844 on a temporary basis. As such, they do not possess sufficient similar interests to the bargaining unit of store 9844, their ballots should not be opened, and they should be excluded from the election.

5. Objection No. 4: “Union Quiz” Raffle

The Petitioner's final objection alleges that the Employer held a raffle to improperly affect employee free choice. As the Board has explained, raffles are prohibited if “(1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.” *Atlantic Limousine*, 331 NLRB 1025 (2000). “Conducting a raffle” is defined by the Board to include “(1) announcing a raffle; (2) distributing raffle tickets; (3) identifying the raffle winners; and (4) awarding the raffle prizes.” *Id.*

Even if a raffle does not fall within either of the two prongs expressly identified by the Board in *Atlantic Limousine*, the Board still will scrutinize an objected-to raffle, and set aside an election, if the raffle “involve[s] promises or grants of benefit that would improperly affect employee free choice; or...allow[s] the employer to identify employees who might or might not be sympathetic, and thus to learn where to direct additional pressure or campaign efforts.” *Id.*

The Circle K raffle was unique, so unique in fact that the Employer *never* before held such a raffle. The evidence shows that the Employer only held a raffle *after* learning of the Union organizing effort:

Q BY MR. MCNAMARA Okay. You were at Circle K as an employee for about eight months give or take?

A Roughly.

Q Okay. At any point prior to the Union organizing campaign did Circle K ever conduct any kind of an employee raffle where a prize was awarded?

A No.

Q Did Circle K ever give some type of gift of 450 dollars or in that range to any employee other than this time during the Union organizing campaign?

A Not to my knowledge, no.

Q BY MR. MCNAMARA Okay. It was created for the Union organizing campaign at the store in question, correct?

A Correct.

Q BY MR. MCNAMARA: And so this particular award program was unique to a store where Union organizing activity was ongoing, correct?

THE WITNESS: Okay. I don't believe it was specific -- it was specific to employees having knowledge so they could go into an election knowing all sides.

Q BY MR. MCNAMARA: Okay. So it was created from your perspective to give employees knowledge to make an informed decision with regard to their vote and the Union organizing campaign, correct?

A Yes.

Q And certainly, you can't show me any other store in which this Joint Exhibit 3, Union quiz was given, where there was no Union organizing campaign, can you?

A I can show you quizzes given in other stores that were not Union related.

Q Okay. That answers my question.

Testimony of Craig Holmes, November 21, 2019 Hearing Transcript at 53:25-55:06.

Q BY MR. REESE So was the quiz created specifically for this store?

A I believe it was from my meetings. It was taken from my meetings. I would have to assume it was for this store.

Q And there was no other stores that you're aware of that had a union quiz?

A A union quiz? Not to my knowledge.

Testimony of Bob Cordray, November 21, 2019 Hearing Transcript at 72:04-72:09.

The evidence is clear that this raffle was uniquely created to use *only* at store 9844 and was *directly and solely related* to the Union organizing effort.

The facts of the instant case parallel the facts of *BFI Waste Systems*, 334 NLRB 934 (2001). In *BFI Waste Systems*, the employer held a raffle for television. Similarly to Circle K, the Employer in *BFI Waste Systems* had never before held a raffle prior to the organizing campaign and election. The Board determined that the Employer's raffle in *BFI Waste Systems*, after never before holding any sort of monetary raffle, was significant and could improperly affect employee free choice. In the instant case, the circumstances are the identical. While the Employer contends that other raffles or prizes were regularly given out to employees, such as a trip to Mexico, the evidence shows that even Circle K's *own employees* were unaware of such prizes.

Q BY MR. PECOR Okay. You said that while you were employed there, you were not privy to any other contests where large value prizes were involved. Is that your testimony?

A Yes.

Q Do you remember the ambassador club?

A (Nonverbal reply).

Q So you weren't aware that all CSRs were eligible for a trip to Mexico, valued at over 2,500 dollars while you were employed there?

A No.

Testimony of Amber Garrison, November 21, 2019 Hearing Transcript at 39:06-39:15

The evidence is clear that the Employer *only* held the raffle due to the Union organizing campaign, and the *only reason* the Employer held the raffle was to dissuade involvement in the Union organizing campaign.

The amount of prize money awarded to the winner was *exorbitant*. The evidence shows that the \$450.00 prize equaled 1-2 *weeks* of pay for a full-time Circle K employee.

Q BY MR. MCNAMARA All right. And you had already testified the award, the prize was 450 dollars. Was it in cash or --

A No. It was a -- like a Visa gift card.

Q Okay. And 450 dollars to you, how much would that represent in terms of your weekly...

A About a week and a half, two weeks of wages.

Testimony of Amber Garrison, November 21, 2019 Hearing Transcript at 34:13-34:18

BFI Waste Systems again parallels the evidence in the case at present. In *BFI Waste Systems*, the Employer raffled a television worth approximately \$890.00. The Board concluded that under the circumstances of the raffle, "where the potential to receive \$890.00 in prizes is suddenly offered by the Employer to employees less than one week before the election, we are persuaded that \$890.00 was a substantial benefit and sent a message to employees that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *Id.* Citing *B & D Plastics*, 302 NLRB 245.

The evidence in this case echoes *BFI Waste Systems*. In the instant case, \$450.00 is a *substantial* amount for the full-time non-management employees of Circle K. Further, while the Board found it compelling and significant that the *BFI Waste Systems* raffle was held less than a week before the election, thereby improperly affecting employee free choice, the Circle K raffle

was held just slightly more than 24 hours prior to the election. Witnesses from both the Petitioner and the Employer testified to the raffle's timing:

Q BY MR. PECOR Okay. And when you described the election -- or the meeting where the drawing was actually held, was that held the morning before the --

A Yes.

Q -- the day before the election, but in the morning?

A Yes.

Q Okay. So it was before noon?

A It was 24 hours before.

Q More than 24 hours?

A Yes.

Q Okay. Because the election was at 1:30.

A Yeah, it was before noon.

Q I just want to be clear. Okay. So it was before noon on the day of -- if the election was on the 31st was it before noon the day of the 30th?

A Yes.

Testimony of Amber Garrison, November 21, 2019 Hearing Transcript at 38:15-39:05

Q BY MR. REESE So you awarded the prize the 30th, correct?

A Correct.

Q Did you choose that specifically the day before the election?

A It was known that it was going to be on our third and final meeting we were going to announce the winner.

Testimony of Bob Cordray, November 21, 2019 Hearing Transcript at 73:10-73:15

The Employer pressed as close to the hardline 24-hour rule as possible without crossing, clearly demonstrating promising a payoff that improperly affects employee free choice.

The Employer's quiz itself is also telling. *See* Joint Exhibit 3. For example, one quiz question, intended to be answered false by quiz takers for a "correct" answer, asks whether striking workers are eligible for unemployment benefits. *Id.* What the question and Employer so conveniently fail to explain to employee quiz takers is that the Union, through its strike fund, can and will provide benefits during a strike. This is just one of several benefits the Union can provide employees that the Employer chose to gloss over. This quiz is clearly intended to cast the Union in a negative light. In fact, as one will note, every question deals solely with the union and is manifestly part of the company's anti-union propaganda campaign. Further, as the evidence shows, the anti-union campaign was held during a captive audience meeting where employees were required to attend.

Q BY MR. MCNAMARA Okay. All right. And you were aware of the union organizing campaign?

A Yes.

Q All right. And the company held a number of meetings in opposition to that campaign; is that right?

A Yes.

Q And did you -- were you required to attend those meetings?

A Yes, they were mandatory.

Q All right. And do you recall roughly how many meetings there were?

A I believe there were three.

Q Okay. And you attended all three?

A Yes.

Testimony of Amber Garrison, November 21, 2019 Hearing Transcript at 24:06-24:18

Finally, even if the raffle was not the *only* raffle ever held by Circle K, or if the raffle was not a *direct result* of the Union organizing efforts, or if \$450.00 was not a *substantial* sum of money, or if the raffle was not held on the *eve* of the election, the Employer would still be in violation of the *Atlantic Limousine* rule. *Atlantic Limousine* established that the Board must scrutinize a raffle that allow[s] the employer to identify employees who might or might not be sympathetic, and thus to learn where to direct additional pressure or campaign efforts. The evidence is clear that Circle K did just that during this raffle.

Q BY MR. MCNAMARA: All right, so what did -- what did Pinky say to you?

A She said that we needed -- she needed our raffle number to distinguish which quizzes were handed in because she had too many and I asked her how so, because during the meeting Nora, the assistant manager, asked if everybody could participate in the quiz, and Bob told her yes. And when I asked her how she had too many quizzes, she said well, there's only the employees, non-management were allowed to participate in the quiz. So she needed to rule out whose quizzes were extra.

Q All right. So did you give her your ticket?

A Jillian gave her her ticket, like handed it to her, and I read off my numbers.

Q Okay.

A And she said that she wasn't sure if Dena had handed hers in or not and I said that Dena did drop hers in the safe.

Q Okay. All right. So at least two of the employees -- management was aware of at least two employees who had ticket coupons and who they were?

A Yes.

Testimony of Amber Garrison, November 21, 2019 Hearing Transcript at 31:20-32:14

While the Employer's witness, Parminder "Pinky" Hundal ("Pinky"), attempted to rebut Garrison's testimony, Pinky was hardly compelling: yes or no answers to leading questions, with testimony lasting less than a couple of minutes. Pinky's testimony was essentially incredible and unpersuasive in contrast to the detail given by Garrison. Requiring employees to divulge their raffle numbers to a member of management clearly demonstrates that the Employer wanted to identify employees sympathetic to the Union and ensure they could not win the raffle.

6. Conclusion

The Union's objections in this matter are of critical importance to this small unit election. Faced with a Union organizing campaign, the Employer pulled out all of the stops, selecting a member of management as its observer, transferring in temporary employees in the midst of the campaign, and, in its *piece de resistance*, holding a raffle based on a quiz rife with anti-union propaganda on the very eve of the vote in a transparent attempt to improperly and unlawfully

interfere with the free choice of its employees. These illegal efforts should not countenanced by the Board, and remedial action should be taken, up to and including a remedial bargaining order.

Dated: December 3, 2019

Respectfully Submitted,



Todd McNamara, General Counsel



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Certificate of Service

I hereby certify that the foregoing *Petitioner's Post-Hearing Brief* was e-filed with the National Labor Relations Board on December 3, 2019, and served on the same date on the party or parties below by the means indicated.

Grant Pecor via email to **`gpecor@clarkhill.com`**

Clark Hill

Counsel for Employer



Tyler Reese

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
Region 27

Circle K Stores, Inc.,

Employer

and

27-RC-242382

**United Food & Commercial Workers
Union, Local 7, AFL-CIO,**

Petitioner

Post-Hearing Brief of Employer

Circle K Stores, Inc., (the “Employer”), by its attorneys, Clark Hill PLC, hereby submits this Post-Hearing Brief following the hearing over Petitioner’s Objections, which occurred on November 21, 2019, and in opposition to the allegations included in the Petitioner’s challenged ballots and remaining objections. Pursuant to the determination of the Hearing Officer, this Brief is hereby submitted by the December 3, 2019 deadline established at the conclusion of the hearing on the Petitioner’s challenged ballots and amended objections.

Introduction

On or about May 29, 2019, the Petitioner, United Food & Commercial Workers Union, Local 7, AFL-CIO, petitioned to represent a unit of the Employer’s employees at its 2709844 Store, which is located at 4020 E. 104th Avenue in Thornton, Colorado. Thereafter¹, the parties

¹ The processing of this petition was initially blocked by the Petitioner’s Charge in Case No. 27-CA-242802, which was later withdrawn.

entered into a Stipulated Election Agreement on or about July 16, 2019. (Jt. 1²). An election was held pursuant to the terms of the Stipulated Election Agreement on July 31, 2019.

The Petitioner challenged two voters during the election on the basis that they were temporary employees (i.e. Linda Longstrom and Mayra Canales). In addition, the Petitioner filed objections to conduct they alleged affected the results of the election on or about August 7, 2019. Following the Region's investigation into the conduct included in Petitioner's Objections 1 and 2 (See Case No. 27-CA-246677), the Petitioner requested to withdraw those objections and the Regional Director Ordered a hearing over the Petitioner's remaining objections, which included the following allegations:

1. The Employer's observer was an individual closely identified with management; and
2. The Employer held a raffle that constituted a promise or grant of benefit that improperly affected employee free choice or allowed the Employer to identify employees' sympathies.

This brief follows the hearing over these allegations and the two challenged ballots from the Election. For the reasons set forth herein, the Petitioner's objections should be dismissed, and the two challenged ballots should be opened as the allegations involved are not supported by any substantial evidence nearly enough to meet their burden of proof in this instance.

² Parenthetical numbers preceded by the letter "T" refers to the transcript of the proceeding before Hearing Officer Renee C. Barker at the National Labor Relations Board Region 27 offices located at 1961 Stout Street, Room 13-103, in Denver Colorado beginning on November 21, 2019, 2019 at approximately 9:00 a.m. Parenthetical numbers preceded by the letters "Jt." Refers to the parties joint exhibits, "B" refers to the exhibits of the Board. Neither the Employer nor Petitioner presented any exhibits beyond the joint exhibits. Due to the record, number of exhibits, and limited time frame allowed for the submission of briefs, any failure to cite to a specific page in the transcript should be considered a reference to the entire record. Likewise, while references to the record are meant to assist the reader in locating evidence to support an assertion contained in the brief, those references should not be construed as reference to the only places in the record where evidence supporting any assertion can be found.

Analysis

1. The Petitioner Failed to Prove Either Challenged Voter was a Temporary Employee.

While it should go without saying, the Petitioner wholly failed to present *any* evidence that either challenged voter (i.e. Linda Longstrom and/or Mayra Canales³) were temporary employees. Indeed, the Petitioner's entire basis for challenging these individuals appears to be based on nothing more than inadmissible hearsay. As such, there should be little doubt that the Petitioner failed to meet its burden of proving that either individual was a temporary employee as alleged.

There is no dispute that employees are excluded as temporaries where employees are employed for a specific task, for a set duration, or have no substantial expectancy of continued employment and are notified of this fact. *Indiana Bottled Gas Co.*, 128 NLRB 1441, 1442 fn. 4 (1960); *Owens-Corning Fiberglass Corp.*, 140 NLRB 1323, 1325 (1963); *Sealite, Inc.*, 125 NLRB 619 (1959); *E. F. Drew & Co.*, 133 NLRB 155, 156–157 (1961). In determining if an individual is a temporary employee, the Board looks at whether the individual designated as a temporary employee has an uncertain tenure with the Employer. *Marian Medical Center*, 339 NLRB 127 (2003). In particular, “the Board examines whether or not the employee’s tenure is finite, and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created.” *Id.* At 128. (Citing *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1979) (students hired for one summer with-out expectancy of continued employment); *Kaiser Cement & Gypsum*, 158 NLRB 1740, 1744 (1966) (employees included in one unit who were temporarily transferred to work at location of a separate unit);

³ Individuals described by the Union’s counsel as “known antiunion supporters”. T-73.

FWD Corp., 138 NLRB 386, 390 (1962) (employee on 6-month temporary training assignment to unit location); and *Irwin & Lyons Contractors*, 51 NLRB 1370, 1373 (1943) (employees transferred from one logging camp to another during temporary shutdown)). Based on this analysis, the Board will generally find that an individual “hired for a finite, ascertainable term will not have the community of interest with a unit of employees sufficient to qualify them to vote.” *Id.*

However, in the case at hand, there is no evidence that either Linda Longstrom or Mayra Canales’ were hired for a finite, ascertainable term or that they maintained that status on July 12, 2019, which was the eligibility date for the instant election. *See* Jt. 1, p. 1. Indeed, the undisputed evidence presented confirms quite the opposite. T-46-49. That is, the undisputed testimony of Craig Holmes confirmed that both Linda Longstrom and Mayra Canales were “permanently” transferred to Store 9844 on June 4, 2019⁴, following the closure of their prior store. T-46-47. Indeed, the undisputed evidence confirmed that both individuals remained assigned to Store 9844 even though Circle K has started staffing their prior store (i.e. Store 4095) and that there were no plans to move either individual back to their prior store as the Petitioner alleged. T-46-49. In this regard, there should be little doubt that the undisputed evidence presented at the hearing confirms that neither Longstrom or Canales were employed for one job only, or for a set duration, or otherwise had no expectation of continued employment at Store 9844. Neither individual was assigned to store 9844 for a finite, ascertainable term. Accordingly, there should be little doubt that neither individual was a temporary employee and the ballots of both individuals should be opened and counted.

⁴ The parties stipulated that employees were transferred to Store 9844 on June 4. T-59.

2. The Petitioner Failed to Prove the Employer's Observer was Objectionable.

Section 102.69(a) of the Board's Rules states that for manual elections, "any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe." In this regard, the parties in this instance agreed to the following provision in the Stipulated Election Agreement:

11. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

(Jt. 1, p. 3). Accordingly, both parties should have known they could be represented by an observer in this instance and the agreed upon limitations as to who would be allowed to serve in that capacity during the election.

The Petitioner argues that the Employer's choice of observer was a "per se violation of laboratory conditions requiring the election to be set aside." (Citing *Mid-Continent Spring Co*, 273 NLRB 884 (1985)). However, the Petitioner not only wholly failed to present evidence that the Employer's chosen observer was "closely identified with management" but it misstates the law in this area. In this regard, it should not be lost that the Board's actual regulations do not put restrictions on who may be used as an observer beyond "such limitations as the regional director may prescribe." 29 CFR 102.69(a). In this instance the Regional Director did not proscribe *any* limitations on who may serve as an observer beyond those included in the parties' Stipulated Election Agreement, which provided that each party's observer was required to be an employee and could not be one with supervisory authority. (Jt. 2, p. 3). There were no other limitations placed upon the parties by the Board's rules, the Regional Director or the Stipulated Election Agreement. As such, there should be no doubt that the Employer was compliant with the applicable limitations on who could serve as an observer in this instance as it is undisputed that

its observer was an employee and there is not even the allegation that he was a supervisor under the Act. For these reasons alone, the Petitioner's objection over the Employer's observer should be dismissed.

With that said, the Employer again acknowledges that, in the interest of free elections, the Board has previously held that persons closely identified with management may not act as observers. See, e.g., *First Student Inc.*, 355 NLRB 410 (2010); *Sunward Materials*, 304 NLRB 780 (1991); *Mid-Continent Spring Co.*, 273 NLRB 884 (1985); *Peabody Engineering Co.*, 95 NLRB 952, 953 (1951); *Union Switch & Signal Co.*, 76 NLRB 205 (1948). However, in doing so, the Employer asserts that these prior holdings were never incorporated into the Board's Rules despite their recent revision. Rather, the current rules only limit who may serve as an observer "as the regional director may prescribe." 29 CFR 102.69(a). As such, there would appear to be strong reason to believe that the prior prohibition against the utilization of "persons closely identified with management" as observers now is only applicable to the extent limited by the Regional Director. Indeed, given the Board's failure to incorporate this requirement into its rules, the Petitioner's objection to the Employer's observer should be dismissed as there is no evidence establishing that the Employer's observer violated the limitations included in the parties Stipulated Election Agreement (Jt. 1, p. 3).

However, even if the Board's prior determinations regarding the use of "persons closely identified with management" as observers apply; the current record is wholly devoid of the evidence necessary to apply those holdings in this instance. Indeed, the Union has wholly failed to provide the type of evidence relied upon by the Board for such a finding in this instance. For example, in the *Mid-Continent Spring Co* (cited by the Petitioner), the hearing officer found that the Employer's Observer was closely identified with management due to his being considered a

“personnel manager” and member of the management negotiating team. *Mid-Continent Spring Co, supra* at 884, n. 2. She also attended supervisory meetings, represented the Employer at the first step of the grievance procedures, advised the Union of hiring and terminations, received employee complaints and advised employees about personnel policies. *Id.* As such, the Board found that the Employer’s use of her as an observer was “a fundamental deviation from the Board’s rules which requires the election be set aside and a new election held” despite the hearing officer’s finding that such an individual could not have had a coercive effect on voters. *Id.* at 884.

A review of other cases where the Board has set aside an election due to individuals “closely identified with management” yields similar findings based on the role the individual involved played with potential voters. See, e.g., *First Student Inc.*, 355 NLRB 410 (2010) (observer interviewed applicants for CDL program, notified applicants of acceptance into program, conducted training in classroom and on buses, administered CDL testing, completed assessments of driver performance, informed employees when they would be required to undergo further testing, shared the only office with a supervisor and, in some instances, was the only employer representative applicants dealt with and, therefore, whom they could reasonably believe played a role in deciding whether they were ultimately hired; *Sunward Materials*, 304 NLRB 780 (1991) (involving a compliance/training specialist that conducted monthly on-site safety and training sessions where employees were required to sign an attendance sheet, was responsible to train new hires, reviewed the logs of drivers, monitored traffic records, and maintained a file on each employee); *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980) (Employer’s observer objectionable because he attended management meetings, was referred to as a supervisor, spoke at two employee meetings (including one with other

management), relayed information from management to employees and was placed in a strategic position where employees could reasonably believe he spoke on behalf of management); *Peabody Engineering Co.*, 95 NLRB 952, 953-54 (1951)(use of company Attorney objectionable where allowed due to misrepresentation of attorney on designation of observer form); *Union Switch & Signal Co.*, 76 NLRB 205 (1948) (not objectionable to deny Employer ability to appoint its attorney as observer where Employer declined to appoint another observer). Needless to say, in these decisions, the employers involved had previously held its observer out as an agent of the Employer for issues directly tied to the employees in the unit (be it for personnel matters or other proceedings involving employees). However, in this instance, the record is wholly devoid of any evidence that might insinuate that the Employer's observer represented the Employer in any capacity related to its employees or otherwise played any role related to their employment, much less that employees even knew who the observer was prior to the day of the election. Indeed, quite the opposite. Thus, there can be little doubt that the Petitioner failed to meet its burden sufficient to support its objection related to the Employer's observer.

At best, the Petitioner argues that the Employer's observer should be deemed affiliated with management because he has the word "manager" in his job title. See, e.g. Jt 2. However, the Region has already confirmed that an individual's job title alone is insufficient to establish that an individual is closely aligned with management. See *Circle K*, Case No. 27-RC-24017 citing *Southland Frozen Foods*, 282 NLRB 769, 770 fn 6 (1987). Rather, it was incumbent upon the Petitioner to establish that the Employer's observer was closely affiliated with employees "who formulate and effectuate management policies by expressing and making operative the decisions of their employer and who have discretion in the performance of their jobs independent of their employer's established policies." *Case Corp.*, 304 NLRB 939, 948 (1991), *enfd.* 995 F.2d 700

(7th Cir. 1993); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 286 (1974). As such, the evidence in the instant record is woefully short of that necessary to sustain the Petitioner's objection in this instance.

In fact, the record evidence confirms that the Employer's observer not only had no authority over any employee(s) in the proposed unit but that he had only been to the store on a single occasion (for "about ten minutes") prior to his being designated the Employer's observer. T-61. Indeed, there is not even evidence that the Employer's observer was ever even referred to as a "manager" in a manner that might imply the ability to formulate or effectuate policies or make decisions impacting employees. Rather, the Employer's observer was undisputedly a member of its marketing department solely responsible for purchasing tobacco products. T-60. In that capacity he was "very rarely" in one of the employer's stores and appeared out of uniform (i.e. "plain clothes") when he visited a store. *Id.* It follows that the undisputed evidence presented confirmed that he did not have any authority over employees and definitely was not in a position where employee might believe he spoke on behalf of management as he was not even employed in one of the two Employer departments that actually had authority over store staff (i.e. the Employer's Human Resources and Operations Departments). T-45, 60 & 65. As such, there should be little dispute that the Petitioner wholly failed to meet its burden of proving that the Employer's observer was someone so closely identified with management that his serving as an observer might have impacted the election process and the objection asserting otherwise must be dismissed.

3. The Employer's Raffle was not Objectionable.

In *Atlantic Limousine*, 331 NLRB 1025, 1029 (2000), the Board adopted a new rule barring "employers and unions from conducting a raffle if (1) eligibility to participate in the

raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.” Conducting a raffle includes announcing one, distributing raffle tickets, identifying raffle winners, and awarding prizes. *Id.* However, for raffles held outside of the 24-hour period, the Board considers whether “they involve promises or grants of benefit that would improperly affect employee free choice; or whether they allow the employer to identify employees who might or might not be sympathetic, and thus to learn were to direct additional pressure or campaign efforts.” *Id.* at 1029 fn. 13.

In this instance, there is no dispute that the Employer held a raffle for employees outside the 24-hour period preceding the election. That is, the testimony presented confirmed that the Employer held a drawing on the morning of July 30, 2019 at which time it pulled drew a raffle ticket from eligible entries and awarded a gift card worth \$450. T-26-38 & 67-73. In announcing the raffle, the employer distributed quizzes the week prior to the election with a red raffle ticket stapled to the upper right hand corner of the quiz. T-67-69. See also Jt. 3. Employees were informed that anyone turning in the quiz with 100% correct answers would be entered into a raffle for a \$450 gift card. T-29 & 67-69. However, in doing so, employees were specifically instructed that the quizzes and raffle were supposed to be anonymous, with special procedures put in place to ensure as much (e.g. quizzes would contain non-identifiable raffle ticket numbers, should not contain names or other identifying marks, and would be anonymously turned in via the store safe). T-29, 37, & 67-72. Thereafter, all six of the eligible voters submitted quizzes and the four entries with 100% accurate entries were included in the drawing for the gift card, which was held at around 11 a.m. on July 30, 2019.

The Petitioner objected to the election on the basis that “[t]he subject matter of the Union Quiz, the disproportionate reward, which is roughly a week’s salary for most Circle K employees, and ht

mandatory attendance promoted an atmosphere which could reasonable (sic) have dissuaded employees from voting for Petitioner.” (Petitioner Objection 4). However, the instant raffle cannot be said to run afoul of the Board’s rules related to raffles. Not only was the raffle held outside the 24-hour period established by the Board, but the Employer took significant steps to ensure that the raffle could not be used to identify employee sympathies and the amount involved was not so large that it would improperly impact employee free choice. As such, the Petitioner’s objection should be dismissed, and the instant election upheld.

There should be no dispute that raffle in dispute was highly unlikely to identify employee sympathies. Indeed, the Employer went to great lengths to ensure it would be anonymous. In doing so, the Employer provided non-identifiable raffle tickets (containing unique numbers) with every quiz, instructed employees that they should not put their names or other identifying marks on the quiz, made quizzes available so employees could participate without being identified by the Employer, and ensured quizzes would be anonymously turned in via the store safe. Simply put, given the 100% employee participation that occurred in this instance, there was simply no way for the Employer to use the instant quiz/raffle to identify employee sympathies in this instance. As such, any portion of the Petitioner’s objection asserting that the raffle itself allowed the Employer to identify employees’ sympathies is simply without merit.

Other than its undisputed knowledge regarding the ultimate winner’s score, the evidence confirmed that the Employer was unaware of who scored 100% and who did not. T-70. Indeed, the only evidence the Petitioner presented that might even indicate that the Employer was aware of how any employee scored was the unsubstantiated claim made by Amber Garrison that her store manager had asked her and another employee for their ticket numbers. T-29, 31-32. However, this evidence should not be credited. Not only was this specifically denied by the Store Manager (T-77) but such a claim simply does not make sense under the circumstances present. That is, given the great lengths the Employer took to ensure the anonymity of participants, there simply was no need for Hundal to seek ticket numbers given the fact that the quiz filled out by the assistant store manager (and thereby the ticket attached to that quiz) was never co-mingled with the quizzes or tickets of the eligible voters. Rather, the undisputed

testimony confirmed that this quiz (and the attached ticket) was not turned in via the safe as the other entries were and, in fact, it was destroyed after it was discovered under the keyboard in the office. T-68-70, 75 & 78. Thus, there was no need to inquire regarding employee ticket numbers.

Indeed, despite testimony confirming that another employee (i.e. Jillian) participated in this discussion, the Petitioner never sought to present her as a witness to confirm what had occurred. At a minimum, the Region should draw an adverse inference against the Petitioner's assertion regarding the alleged inquiry into employee ticket numbers for their failure to call Jillian to testify. Either way, Garrison's unsubstantiated testimony alone, does not present enough evidence to establish an objection in this instance.

Indeed, in reviewing the Petitioner's objection, there should be little doubt that it did not involve any insinuation that the Employer interrogated employees in order to identify employee sympathies based on participation. The Petitioner's objection simply made no such assertion. Rather, the Petitioner claimed that "the subject matter of the Union Quiz, the disproportionate reward . . . and the mandatory attendance promoted an atmosphere which could reasonable (sic) have dissuaded employees from voting for Petitioner." As such, even if Garrison's testimony were to be credited, the allegation was not sufficiently included in the Petitioner's objections to be timely considered in this proceeding.

There also should be no dispute that the instant raffle did not involve a promise or benefit of the size that likely impacted employee free choice. Although the Petitioner attempted to describe the prize as a weeks' worth of wages, the reality is the \$450 gift card is similar or less than the value of prizes previously found permissible by the Board. *See, e.g., Sony*, 313 NLRB 420, 420-21 (1993) (holding raffle of \$1300 television set and a \$280 discman were not so substantial as to warrant a new election); *American Induction Heating*, 221 NLRB 180 (1975) (raffle of television set not objectionable), and *Tunica Mfg. Co.*, 182 NLRB 729 743 (raffle of color television set, then valued at \$350-\$400, not objectionable).⁵ Indeed, in this instance the undisputed record evidence confirms that the Employer has a

⁵ In fact, when adopting the 24-hour rule for raffles in *Atlantic Limousine, Inc, supra* at 1025, the Board never once criticized the Regional Director's determination that the TV/VCR (then valued at \$350) was not so

history of providing contests with similar (and far greater) prizes involved. T-49-50. As such, even if the amount involved were thought to be of the size that might impact free choice, there are mitigating factors present in this instance that likely offset the impact of the amount involved. *See, e.g., Chicagoland Television News*, 328 NLRB 367 (2000).

In short, the circumstances surrounding the Employer's raffle in this instance are not of the type found objectionable by the Board. Not only did the employer take steps to ensure the anonymity of participants, but nothing in the process limited their eligibility to their voting in the election or being at the election site on election day. In fact, all facets of the instant raffle occurred outside the 24-hour period preceding the election. Moreover, the amount involved was similar in amount to those amounts previously offered to employees during prior employee contests and not so large that it drew attention away from the election or likely induced employees into opposing the Petitioner. As such, the instant record is simply insufficient to establish a basis for overturning the instant election and the objection to the contrary must be denied.

Conclusion

For the foregoing reasons, the Employer requests that the Region open the challenged ballots of Linda Longstrom and Mayra Canales, dismiss the Petitioner's remaining objections and certify the election results in this proceeding.

Respectfully Submitted,



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Dated: December 3, 2019

substantial that it diverted attention away from the election or its purpose inherently induced voters to support the Employer's position despite a litany of discussion regarding the value of raffle prizes.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

CIRCLE K STORES, INC.

Employer

and

Case 27-RC-242382

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO**

Petitioner

HEARING OFFICER'S REPORT ON CHALLENGES AND OBJECTIONS

On July 31, 2019,¹ an agent of Region 27 conducted an election among certain employees of the Employer. However, the parties disagreed about whether certain individuals are eligible voters and those individuals voted utilizing the Board's challenged ballot procedure. The subsequent count of the ballots revealed that the challenged ballots are sufficient to affect the results of the election.

The determinative challenged ballots, the party challenging eligibility and the reasons for the challenge are as follows:

<u>Name of Voter</u>	<u>Challenged By</u>	<u>Reason for Challenge</u>
Linda Longstrom	Petitioner	Temporary employee
Mayra Canales	Petitioner	Temporary employee

The Petitioner also contests the results of the election, claiming that the Employer engaged in objectionable conduct, and therefore asks that the election be set aside and that a new election be held. Specifically, the Petitioner contends that the Employer's election observer was closely aligned with management. The Petitioner also contends that the Employer held a raffle right before the election and that the contest itself was to allow the Employer to identify employees' sympathies and that the raffle prize constituted an unlawful promise or grant of benefit.

After conducting a hearing and carefully reviewing the evidence as well as the arguments made by the parties, I conclude that Linda Longstrom and Mayra Canales are not temporary employees and therefore recommend that the Petitioner's challenge to their eligibility be overruled.

I also recommend that the Petitioner's objections be sustained in part because the evidence demonstrates that the Employer engaged in objectionable conduct. More specifically,

¹ All dates herein are 2019 unless otherwise indicated.

although there is no credible evidence that the Employer held a raffle to allow the Employer to identify employees' sympathies, the credited evidence supports a conclusion that the raffle prize was an unlawful grant of benefit.

After recounting the procedural history, I discuss the applicable burdens of proof and the Board standard for setting aside elections. Then I describe the Employer's operation. Finally, I discuss the challenged ballots and I discuss each objection.

PROCEDURAL HISTORY

The Petitioner filed the petition on May 29. The parties agreed to the terms of an election and the Region approved their agreement on July 16. The election was held on July 31. The employees in the following unit voted on whether they wished to be represented by the Petitioner:

Included: All full-time and regular part-time customer service representatives and lead customer service representatives employed by the Employer at its Store No. 2709844, which is located at 4020 E. 104th Ave., Thornton, Colorado 80241.

Excluded: Store managers, assistant store managers, office clerical employees, professional employees, contracted employees, temporary employees, salaried employees, guards and supervisors, as defined in the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that two ballots were cast for the Petitioner, and that two ballots were cast against representation. There were two challenged ballots, a number sufficient to affect the results of the election.

The Petitioner filed timely objections and then filed amended objections, replacing--not supplementing--the original objections on the same date. The Regional Director for Region 27 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the challenged ballots and the amended objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Petitioner's challenges and amended objections are warranted, I heard testimony and received into evidence relevant documents on November 21. I permitted the parties to file briefs. Both parties filed briefs, which were fully considered.

In the order directing a hearing, the Regional Director also approved the Petitioner's withdrawal of Amended Objections 1 and 2.

THE BURDENS OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

The burden of proof rests on the party seeking to exclude a challenged individual from voting. *Sweetener Supply Corp.*, 349 NLRB 1122 (2007), citing *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). Thus, the Petitioner has the burden to establish that the two challenged voters are ineligible to vote.

It is well settled that “[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania*, 360 NLRB 637 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board’s test the issue is not whether a party’s conduct in fact coerced employees, but whether the party’s misconduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election. *Baja’s Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses’ testimony.

THE EMPLOYER’S OPERATION

Circle K Stores, Inc. is a Texas corporation that operates gas stations and convenience stores throughout the region, including Store No. 2079844 (“Store No. 9844”), located at 4020 East 104th Avenue in Thornton, Colorado. Store No. 9844 is a store in the Rocky Mountain division. There are five Regional Operations Directors in the Rocky Mountain Business Unit

working in El Paso, Albuquerque, Oklahoma City, and Denver. The Rocky Mountain Business Unit is comprised of several departments, including Operations, Marketing, Real Estate, Human Resources, Finance, and Marketing. Both the Operations and Human Resources departments have direct responsibility over employees. None of the other departments do.

The Regional Operating Director for Store No. 9844 has responsibility for 95 stores located north of I-70 and west of Santa Fe Drive in Denver and all the way out to Grand Junction, Colorado and Durango, Colorado. Reporting to the Regional Operations Director are the Market Manager, the Store Manager and the Assistant Manager. The rank and file employees and eligible bargaining unit members at Store No. 9844 are Lead Customer Service Representatives and Customer Service Representatives.

THE PETITIONER'S CHALLENGED BALLOTS AND MY RECOMMENDATIONS

Linda Longstrom and Mayra Canales

At the election, the Petitioner challenged the eligibility of employees Linda Longstrom and Mayra Canales on the basis that they are temporary employees. Although there is no dispute that they are both regularly employed by Employer, the Petitioner contends that these employees were only temporarily assigned to the store at issue.

The Petitioner did not call Longstrom or Canales to testify, so there is no direct evidence of these employees' job classifications or the work that they perform or how the work that they perform compares to other unit employees. The Petitioner presented a witness who attempted to testify that one of the contested employees informed her that she was only assigned there temporarily.

Craig Holmes is the Regional Operations Director for Store No. 9844 and the other 90 plus stores in his region and has direct authority over those stores. According to Holmes, Store No. 4905, a mini-truck stop at I-25 and Broadway, was closed for a period of time so it could be improved and rebuilt. At hearing the parties stipulated that Store No. 4905 closed on June 3. The approximately fifteen employees who worked at that store were permanently transferred to other stores, including stores in Commerce City, Thornton, Broomfield and Wheat Ridge. The parties also stipulated that, on June 4, two employees from Store No. 4905, Longstrom and Canales, were permanently transferred to Store No. 9844, where they remain today. Holmes testified that he personally notified both Longstrom and Canales that Store No. 9844 was their new permanent work location.

Store No. 4905 was scheduled to reopen on approximately December 7, with fifteen new employees and three new managers hired as of the date of the hearing. According to Holmes, Longstrom and Canales can make a request to transfer back to Store No. 4905, or any other store, by making a request to the Store Manager, who would notify the Market Manager. If there is availability, then Holmes would be the one to approve or disapprove the request. Unless

Longstrom and Canales follow this transfer process, they have no expectation of working in Store No. 4905 again.

I found all witnesses on this subject to be generally credible and do not need to resolve any credibility disputes. To the extent that the Petitioner's witnesses attempted to offer statements from other individuals, this does not constitute testimony by someone with direct knowledge of the facts. Holmes testified without dispute that he is in charge of Store No. 9844 and that he himself notified Longstrom and Canales that their transfers to Store No. 9844 on June 4 would be permanent. There is no direct evidence to establish otherwise.²

Well-settled Board law holds that employees are excluded as temporaries where employees are employed for a specific task, for a set duration, or have no substantial expectancy of continued employment and are notified of this fact. *Indiana Bottled Gas Co.*, 128 NLRB 1441, 1442 fn. 4 (1960); *Owens-Corning Fiberglass Corp.*, 140 NLRB 1323, 1325 (1963); *Sealite, Inc.*, 125 NLRB 619 (1959); *E. F. Drew & Co.*, 133 NLRB 155, 156-157 (1961).

In general, the exclusion of an employee from a bargaining unit due to his or her temporary status is based on community-of-interest principles. See *Marian Medical Center*, 339 NLRB 127, 128 (2003) (temporary employee analysis focuses on "the critical nexus between an employee's temporary tenure and the determination whether he shares a community of interest with the unit employees"); *St. Thomas-St. John Cable TV*, 309 NLRB 712, 712 (1992) (finding that challenged voter was a "temporary employee who lacked a sufficient community of interest with unit employees to be an eligible voter"); *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982) (finding challenged voter "to be a temporary employee who does not share a community of interest with any of the unit employees"). In this case, as I noted above, there is no direct evidence of community-of-interest principles on which to base my analysis.

As such, I find that the challenge to the temporary employees should be overruled. In *Golden Fan Inn*, supra, the Board held that "the burden of proof rests on the party seeking to exclude a challenged individual from voting." I find that the Petitioner has not sustained its burden of proof, as the evidence adduced at the hearing does not support a finding that these employees are ineligible to vote. Rather the credible evidence establishes that these employees were permanently placed at Store No. 9844 before the eligibility date as set forth in the parties' Stipulated Election Agreement (Joint Ex.1).

² I therefore find it unnecessary to analyze these employees' status under the two eligibility tests advanced by the Petitioner in its brief.

THE PETITIONER'S OBJECTIONS AND MY RECOMMENDATIONS

Amended Objection 3: **On July 31, 2019, the Employer chose Lali Dhillon, an individual closely aligned with management, to serve as its election observer.**

Record Evidence

At hearing the Petitioner's witness, Randy Tiffey, who is the Organizing Director for the United Food and Commercial Workers, Local 7, testified that, a few days before the election, the Employer designated Tom Fitzgerald as its election observer. On July 31, at the pre-election conference held right before the election, the Employer first notified the parties that Lali Dhillon would be the Employer's election observer instead. Tiffey testified that Dhillon indicated that he is a manager in a similar position to Tom Fitzgerald and Tiffey testified that he objected to Dhillon acting as the Employer's observer. The election proceeded and Dhillon was the Employer's election observer.

Lali Dhillon testified at the hearing. He is a Category Manager in the Marketing Department in the Rocky Mountain Business Unit. He is in charge of the purchasing in his "category," which is tobacco products. He is not involved in the operations of the actual stores. He is rarely in the Employer's stores, maybe once a year. When he goes to a store, he visits in plain clothes and he goes to ascertain if there is any room to expand the space for his products. While in the store, he will introduce himself to whichever employees are in the store at the time and tell them why he is there. According to Dhillon, he visited Store No. 9844, and many other stores, once in the summer of 2018 to measure the space that was available for his product. While in Store No. 9844, he spoke only with the Store Manager and he stayed only about ten minutes.

Dhillon testified that, with regards to Store No. 9844, he does not have any roles with employees, has never required the employees to sign anything on his behalf, does not have any employees that report directly to him, has never interviewed applicants, has never participated in the issuance of employee discipline, has never participated in meetings related to employee grievances or complaints or layoffs of employees or transfers of employees or evaluation of employees.

Dhillon was not present at any meetings at Store No. 9844 where the Union was discussed, but Dhillon did serve as the Employer's election observer on July 31. Dhillon had not met any of the employees at Store No. 9844 before July 31 and, to the best of his knowledge, the Union's election observer was not aware of who he was.

There are no substantive credibility disputes to resolve. I found the witnesses to be generally credible and forthright. There is no dispute that Tiffey objected to Dhillon serving as the Employer's observer and there is no dispute, or even assertion, that Dhillon exercised any supervisory authority over the Employer's employees.

Board Law

This issue is the same issue in the Petitioner's Objections in Case No. 27-RC-24017 to an election held at a different store on a different date, but with the same parties. I issued a Hearing Officer's Report on November 1. The Board law has not changed since that time and I rely on the same case authority.

The Board's principal goal in conducting representation elections is to guarantee employees' freedom in exercising their choice with respect to union representation. *First Student, Inc.*, 355 NLRB 410, 410 (2010). As noted above, it is well established that an employer may not select a supervisor or a person closely identified with management to be its election observer. *Worth Food Market Stores*, 103 NLRB 259, 260 (1953); *Watkins Buick Co.*, 107 NLRB 500 (1953); *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980). The Board has held that the use of such observers by an employer warrants setting aside the election since it is a fundamental deviation from the Board's established rules for the conduct of an election. *International Stamping Co.*, 97 NLRB 921, 923 (1951). This is true whether or not there is a demonstration of actual interference or, alternatively, a showing that no interference took place. *International Stamping Co.* at 923; *Peabody Engineering Co.*, 95 NLRB 952, 954 (1951).

While the Act makes no specific mention of "managerial" employees, such employees are excluded from the Act's coverage because their functions and interests are more closely aligned with management than with unit employees. *International Transportation Service*, 344 NLRB 279, 285 (2005); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 286 (1974). Managerial employees have been defined as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer and who have discretion in the performance of their jobs independent of their employer's established policies." *Case Corp.*, 304 NLRB 939, 948 (1991), *enfd.* 995 F.2d 700 (7th Cir. 1993); *NLRB v. Bell Aerospace*, *supra*.

Whether an individual is closely aligned with management depends on the particular facts. In *First Student*, *supra*, the employer's election observer, a trainer for the employer, interviewed applicants for the training program, notified applicants of their acceptance in the training program, conducted the training, administered various other training on behalf of the state and the employer, which the Board found to be objectionable. In *B-P Custom Building Products*, *supra*, the Board found objectionable the employer's designation of an individual who attended management meetings, scheduled shifts, vacations, and overtime, authorized sick leave, and spoke at two employee meetings, one of which he conducted without management officials present. Because he relayed information from management, the Board found that he "had been placed ... in a strategic position where employees could reasonably believe he spoke on its behalf." *Id.* at 1338. Similarly, in *Sunward Materials*, 304 NLRB 780 (1991), the Board found a compliance/training specialist ineligible as an observer. The observer was visible in the hiring process, answering applicants' questions, reviewing their applications for completeness, and scheduling interviews; informed successful applicants of their pay rate and when and where to report for work; provided on-site safety and equipment training to employees; monitored drivers' traffic records; and administered written drivers' tests.

Recommendation

I recommend that this objection be overruled. There is not sufficient evidence to show that Dhillon is closely aligned with management and the Petitioner has not sustained its burden to establish this.³ Although Dhillon's job title is Category Manager, as noted in the previous case, job title alone is insufficient to establish that an individual is closely aligned with management. *Southland Frozen Foods*, 282 NLRB 769, 770 fn 6 (1987). There is no evidence that Dhillon performed any of the job duties relied upon in Board cases to establish managerial status.

Amended Objection 4: **During the election campaign, the Employer conducted a raffle that allowed the Employer to identify employees' sympathies and awarded a raffle prize that constituted an unlawful promise or grant of benefit.**

Record Evidence

During the Petitioner's organizing campaign, the Employer conducted three mandatory employee meetings. At the second of the three meetings, held a few days before the July 31 election, the manager conducting the meeting announced that the managers were going to distribute to employees a questionnaire ("Union Quiz") about the Union. The Union Quiz was entered into evidence as Joint Exhibit 3. The Union Quiz has a red ticket attached to it. The Employer told employees to complete the quiz, which consisted of seven true/false questions and told them that the quizzes were supposed to be anonymous so the employees should not put their names on it.⁴ Finally, the employees were instructed to return their quizzes, but hold onto the red raffle ticket. Those employees who submitted quizzes with correct answers would be entered into a drawing for a \$450 Visa gift card. That amount represents approximately a week and a half to two weeks of wages for the employees. The quizzes were not distributed to employees at the meeting, but were distributed the following day. There were six employees eligible to participate in the raffle and all six turned in completed Union Quizzes.⁵ Four of the six quizzes had 100% correct answers and were entered into the raffle.

³ As such, I find it unnecessary to rely on the argument advanced by the Employer: that the Employer's designated observer complied with the limitations on election observers as set forth in the Board's Rules and Regulations and in the Stipulated Election Agreement (Joint Ex. 1) and by the Regional Director.

⁴ The parties agree that employees were specifically instructed to not put their names on the quizzes and there is no evidence that anyone did put their names on quizzes or that the Employer knew which employee turned in which quiz.

⁵ The night assistant manager also received and turned in a completed quiz. According to one of the Employer's witnesses, the assistant manager received the quiz by mistake, but her quiz was not included with the other quizzes and was later destroyed. The assistant manager's red raffle ticket also did not go into the bucket and she was not eligible to win the raffle prize. This will be discussed further below.

At the final meeting conducted by the Employer, held sometime before noon on July 30, the Employer drew a red ticket and presented the employee who had the winning number with the \$450 Visa gift card. The election was conducted the following day, on July 31.

According to the Employer, it regularly offers several other monetary incentives, such as sales competitions, in which every employee, including those at Store No. 9844, are eligible to compete. The prizes for the sales competitions include cash awards of between \$50 and \$500 every quarter. There are also separate contests available to employees, assistant managers and managers. One such contest is the “ambassador club” and this year the prizes were trips to Mexico valued at either \$2,500 or \$5,000.⁶ However, it is not disputed that the Employer created the Union Quiz specifically for this store and specifically to aid in its campaign. The Employer may have other sales competitions and prizes, but Store No. 9844 was the only store in which the Employer conducted a raffle based on employees correctly answering a quiz about unions.

The Petitioner’s witness testified that, sometime before the drawing of the red raffle tickets, her manager told her and he co-worker that she needed their raffle ticket numbers to distinguish which quizzes were handed in because she had too many (seven instead of the six employees that were eligible to participate). Both the witness and her co-worker gave their raffle ticket numbers to the manager. The Employer called this manager to testify briefly and succinctly that she had never asked any employees for their ticket numbers.

I found both parties’ witnesses to be credible. They were straightforward in their answers and were neither evasive nor unsure about the facts to which they were testifying. However, I find the Employer’s confusion over the number of Union Quizzes and red raffle tickets submitted to be somewhat troubling. The Employer’s witnesses’ testimony was that all the employees anonymously dropped their quizzes in a locked safe, yet, for some reason, the assistant manager did not drop hers in the safe but placed it instead under a keyboard. The Employer contends that the assistant manager’s Union Quiz and red raffle ticket were kept separate, but it was not fully explained and the record evidence is not clear how exactly that happened. I do not specifically discredit any of the witnesses with regards to the red raffle ticket, but I find that it is more likely than not that the Employer may have had to ask employees for their ticket numbers to determine which red raffle ticket should not be included in the drawing.

Board Law

In *Atlantic Limousine Inc.*, 331 NLRB 1025 (2000), the Board adopted a per se rule prohibiting raffles by unions or employers if the raffle is “conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.” With regards to raffles that are conducted outside the 24-hour period, as is the case here, the Board held that raffles conducted more than 24 hours before the polling period “...primarily would raise issues of whether or not they involve promises or grants of benefits that would

⁶ The one bargaining unit employee who testified at hearing was not aware of these incentives and prizes. I credit her lack of knowledge on these other incentives, but also find that the Employer did indeed conduct such competitions.

improperly affect employee free choice; or whether they allow the employer to identify employees who might or might not be sympathetic, and thus learn where to direct additional pressure or campaign efforts.” In so holding, the Board did not apply the per se prohibition to raffles conducted outside the 24-hour period, but instead analyzed those raffles based on whether or not they implicate the concerns listed above.

In *BFI Waste Systems*, 334 NLRB 934 (2001), the Board found the Employer’s raffle conducted one day before the election constituted a benefit that improperly influenced employees’ free choice and was therefore objectionable. The standard of pre-election benefit cases is an objective one. *Gulf States Cannerys*, 242 NLRB 1326 (1979). In determining whether the raffle amounted to an objectionable promise or grant of benefit, the Board applies the test set out in *B & D Plastics*, 302 NLRB 245 (1991). Under *B & D Plastics*, the Board examines whether granting the benefit would tend unlawfully to influence the outcome of the election, taking into consideration the following factors: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. The Board draws an inference that benefits granted during the critical period are coercive. The employer can rebut that inference by establishing an explanation, other than the pending election, for the timing of the benefit. *B & D Plastics* at 245.

In *BFI Waste Systems*, the Board found that all factors weighed in favor of finding the raffle to be objectionable. Notably for this case before me was the Board’s finding that the total value of the raffle prizes (\$890) was substantial and the timing of the raffle (prizes were awarded on several days before the election, with the last prize awarded two days before the election) was telling. See also *Valmet, Inc.*, 367 NLRB No. 84 (February 4, 2019), in which the Board reversed the Administrative Law Judge’s finding that an employer’s pre-election raffle constituted unlawful polling and, using the four factors set forth in *B&D Plastics*, found instead that the raffle was an unlawful promise of benefit and therefore objectionable.

Recommendations

I do not find that the Employer used the Union Quizzes or the red raffle tickets to determine which employees were sympathetic to the Union. Even if the Employer knew at some point beforehand that the Petitioner’s witness and her co-worker submitted their Union Quizzes and red raffle tickets, the Employer ultimately knew at the time of the drawing that all the employees had submitted their Union Quizzes and red raffle tickets. There is no evidence that the Union Quizzes or red raffle tickets had identifying information on them and no evidence that any managers or supervisors could ascertain employees’ Union sympathies based on the short true/false quiz.

However, I find that the prize awarded in the raffle constitutes a grant of benefits that would improperly affect the employees’ free choice. The total value of the raffle prize (\$450) was substantial. All six employees at that store were eligible to participate in the raffle. These employees could reasonably believe that the real purpose of the raffle was to influence

the election outcome because the raffle was open only to the employees at that particular store. The raffle was tied to the Union's organizing campaign and tied to the election and the Union Quiz was created specifically for this raffle. Finally, the timing of the raffle-- slightly more than 24 hours before the election--is telling. As noted above, the Board draws an inference that benefits granted during the critical period are coercive. The Employer failed to advance a legitimate business reason for holding the raffle so close in time to the election and so I draw the inference that the Employer chose to hold the raffle as close to the election as permissible under the rule of *Atlantic Limousine* to attempt to influence the election outcome. See *BFI Waste Systems, supra*.

CONCLUSION

Based on the foregoing, I recommend that the Petitioner's Amended Objection 3 be overruled and that the Petitioner's challenges to the ballots of Linda Longstrom and Mayra Canales be overruled, and that they be opened and counted and that a revised tally of ballots be prepared. If the revised tally shows that a majority of votes were cast for the Petitioner, and the Petitioner then withdraws its objections, I recommend that the request to withdraw those objections be approved and a certification of representative issue. If the revised tally shows that a majority of votes were cast against representation by the Petitioner, then in view of my recommended findings that the Petitioner's Amended Objection 4 be sustained insofar as there is sufficient evidence to establish that the Employer's conduct as set forth in that objection reasonably tended to interfere with employee free choice, I recommend that the election held on July 31 be set aside, and that a new election be directed.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 27 by December 27, 2019. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, [Regional address].

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business, 5:00 p.m. on the due date. If E-Filed, it will be considered timely if the transmission of the entire document

through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: December 13, 2019

A handwritten signature in black ink, reading "Renée C. Barker". The signature is fluid and cursive, with the first name "Renée" and last name "Barker" clearly legible.

Renée C. Barker
Board Agent

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

CIRCLE K STORES, INC.

Employer

and

Case 27-RC-242382

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO**

Petitioner

**ORDER GRANTING JOINT MOTION TO EXTEND FILING
OF EXCEPTIONS TO HEARING OFFICER'S REPORT**

On December 13, 2019, a Hearing Officer's Report on Challenges and Objections issued in the above-captioned matter setting the due date within which to file exceptions for December 27, 2019. Upon the filing of A Joint Motion to Extend the Deadline for Filing Exceptions to the December 13, 2019 Hearing Officer's Report & Recommendations, which was received on December 19, 2019, the time within which to file exceptions to the hearing officer's report is extended until Monday, January 6, 2019.

Dated: December 19, 2019

/s/ Paula Sawyer

PAULA SAWYER
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGIONAL DIRECTOR FOR REGION TWENTY-SEVEN**

CIRCLE K STORES, INC.,

Employer,

and

Case 27-RC-242382

**UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 7, AFL-CIO,**

Petitioner.

**JOINT MOTION TO EXTEND THE DEADLINE FOR FILING EXCEPTIONS TO THE
DECEMBER 13, 2019 HEARING OFFICER'S REPORT & RECOMMENDATION**

The parties mutually agree to submit this joint motion, pursuant to Section 102.2(c) of the Board's Rules and Regulations, to request that the Regional Director for Region 27 extend the deadline to file exceptions to the Hearing Officer's Report and Recommendation on Challenges and Objections ("Report") issued on December 13, 2019, in the above-captioned matter until **January 6, 2020**, for the following supporting reasons:

1. Currently, the parties have until December 27, 2019 to file their exceptions to the Report, which is two days after Christmas and thus right in the middle of the holidays;
2. Neither party could identify when the Hearing Officer's Report and Recommendations would issue and had other commitments when it was received;
3. Both parties have family commitments and previously-scheduled vacations that will be interrupted by having to file their exceptions by the current due date;
4. The parties believe that the Region will be better served by extending the current deadline to ensure legal arguments can be considered and presented in an unrushed fashion.

Based on the foregoing, the parties respectfully request that the Regional Director extend the deadline for the parties to file their exceptions to the Report until **January 6, 2020**.

PETITIONER

By _____

Todd McNamara, General Counsel
United Food and Commercial Workers
International Union, AFL-CIO, Local 7
7760 West 38th Avenue
Wheat Ridge, CO 80033
tmcnamara@ufcw7.com

Date: December 19, 2019

CIRCLE-K STORES, INC.

By _____

Grant Pecor (P29780)
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Grand Rapids, MI
(616) 608-1158
gpecor@clarkhill.com

Date: December 19, 2019

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

CIRCLE K STORES, INC.

Employer

and

Case 27-RC-242382

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO**

Petitioner

**DECISION AND ORDER DIRECTING COUNT OF CHALLENGED BALLOTS
AND ISSUANCE OF REVISED TALLY OF BALLOTS**

Pursuant to a Stipulated Election Agreement, an election was conducted on July 31, 2019 in a unit of all full-time and regular part-time customer service representatives (CSR) and lead CSRs employed by the Employer at its Store No. 2709844,¹ located in Thornton, Colorado.² The tally of ballots prepared at the conclusion of the election shows that of the approximately six eligible voters, two votes were cast for the Petitioner, two votes were cast against representation, and two ballots were challenged, a number that is sufficient to affect the results of the election. The Petitioner challenged the ballots of Linda Longstrom and Mayra Canales on the basis that they were temporary employees.

On August 7, the Petitioner filed timely objections to conduct affecting the results of the election and an offer of proof to support the objections. That same day, the Petitioner filed four timely amended objections replacing, not supplementing, the original objections. On October 21, the undersigned issued an Order Approving Withdrawal of Certain Amended Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Amended Objections (Order), directing a hearing be conducted regarding the two challenged ballots and two of the four amended objections.³ This hearing was held on November 21.

On December 13, the Hearing Officer issued a report on challenges and objections. In doing so, the Hearing Officer overruled the Petitioner's challenges to the ballots of Linda Longstrom and Mayra Canales and overruled the Petitioner's Amended Objection 3 concerning the Employer's observer. However, the Hearing Officer sustained the Petitioner's Amended Objection 4 regarding the Employer's award of a raffle prize, finding that it reasonably tended to interfere with employees' free choice and, therefore, constituted objectionable conduct. Because the ballots of Linda Longstrom and Mayra Canales remain determinative of the outcome of the

¹ In the record, Store No. 2709844 is referred to by the last four digits: "9844."

² All dates refer to 2019 unless stated otherwise.

³ On October 17, the Petitioner requested to withdraw its Amended Objections 1 and 2, which the undersigned granted by the Order dated October 21.

election, the Hearing Officer also recommended that their ballots be opened and counted, and that a revised tally of ballots be issued accordingly. In so recommending, the Hearing Officer stated that if the revised tally shows that a majority of votes were cast for the Petitioner, she further recommended that any request to withdraw the amended objections by the Petitioner be approved and a certification of representative issue. However, the Hearing Officer recommended that if the revised tally of ballots shows that a majority of votes was *not* cast for the Petitioner, that the election held on July 31 be set aside and that a new election be directed in view of her recommendation to sustain Petitioner's Amended Objection 4.

The Employer filed four timely exceptions and a brief in support of its exceptions.⁴ The Employer takes exceptions to the Hearing Officer's findings that: (1) "the prize awarded in the raffle constitutes a grant of benefits that would improperly affect employee's free choice"; (2) "\$450 amounts to a week and a half to two weeks of wages for the employees in the proposed unit; (3) "the 'total value of the raffle prize (\$450) was substantial'"; and (4) the Hearing Officer's drawing an inference "that the Employer chose to hold the raffle as close as possible to the election . . . to attempt to influence the election outcome."

No exceptions were filed to the Hearing Officer's recommendation to overrule the Petitioner's challenges to the ballots of Linda Longstrom or Mayra Canales, and to her recommendation to overrule Petitioner's Amended Objection 3. Additionally, no exceptions were filed to the Hearing Officer's finding regarding a portion of Amended Objection 4 that the Employer's use of a union quiz and raffle prize was not used to determine which employees were sympathetic to the Petitioner. In the absence of exceptions on these findings, I adopt the Hearing Officer's foregoing recommendations.

After a careful review of the record and the Employer's exceptions and supporting brief, I conclude that the Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and arguments presented by the Employer, and as discussed below, I hereby adopt the Hearing Officer's findings, conclusions, and recommendation, as modified herein.

THE OBJECTION

Petitioner's Amended Objection 4 states that two days before the election, the Employer held a mandatory employee meeting where it had employees complete a quiz about the Petitioner's organizing efforts. Thereafter, the Employer awarded a raffle prize of a \$450 gift card to the employee who had the most correct answers to its union quiz. Citing to *Atlantic Limousine, Inc.*, 331 NLRB 1025 (2000), the Petitioner's objection states that the Board will "scrutinize an objected-to raffle, and set aside an election, if the raffle 'involve[s] promises or grants of benefit that would improperly affect employee free choice; or...allow[s] the employer to identify employees who might or might not be sympathetic, and thus learn where to direct additional pressure or campaign efforts.'" Petitioner further cites to *BFI Waste Systems*, 334 NLRB 934 (2001). Petitioner's objection also asserts that the prize awarded was a "disproportionate reward" that was "roughly one week's salary for most Circle K employees, and

⁴ The Petitioner did not file any exceptions to the Hearing Officer's report.

the mandatory attendance promoted an atmosphere which could reasonable [sic] have dissuaded employees from voting for Petitioner.”⁵

The Hearing Officer found that a few days before the July 31 election, the Employer conducted a mandatory meeting where managers announced a contest in the form of a quiz about unions. The quiz was entered into evidence as Joint Exhibit 3 and is titled “Union Quiz.” The quiz had a red ticket attached to it. The Hearing Officer further found that the Employer told employees to complete the quiz, which consisted of seven true/false questions about unions, the election, and collective bargaining, and told employees that the quizzes were to be anonymous so the employees should not put their names on it. Those employees who submitted quizzes with correct answers would be entered into a drawing for a \$450 Visa gift card. The Hearing Officer further found that this amount represented approximately a week and a half to two weeks of wages for the employees.⁶ The quizzes were not distributed to employees at the meeting but were distributed the following day. There were six employees eligible to participate in the raffle and all six turned in completed quizzes. Four of the six quizzes had 100 percent answers and were entered into the raffle. The Hearing Officer further found that the Employer held a final, mandatory meeting sometime just outside of 24-hour period prior to the opening of the polls, where the Employer drew a red ticket and presented the employee who had the winning ticket number with the \$450 Visa gift card. The election was conducted the following day, on July 31.

The Hearing Officer further found that the Employer offers regular monetary incentives, such as sales competitions, in which all employees, including those employed at the store involved in this matter, are eligible to compete. The prizes for the sales competitions include cash awards ranging from \$50 to \$500 every quarter. There also is a separate contest available to employees, assistant managers, and managers, such as the Employer’s “ambassador club,” and that last year’s prizes were trips to Mexico valued at either \$2,500 or \$5,000.⁷ The Hearing Officer further found that the Employer created the union quiz specifically for the store involved in this matter and to aid in its campaign. She further found that while the Employer has sales

⁵ In its supporting brief, the Employer argues for the first time that the Petitioner never objected to the election based upon any alleged promise or grant of any benefit. In doing so, the Employer asserts that Amended Objection 4 lacks any references to “promise or grant of any benefit.” I find, however that the Petitioner’s Amended Objection 4 sufficiently pleads that the Employer’s raffle allegedly constituted a promise or grant of benefit during the critical period and specifically cites to cases relating to promises of or granting of benefits.

⁶ The Employer contends that the Hearing Officer erred in certain factual findings, including that the \$450 Visa gift card amounted to a week and a half to two weeks of wages for the employees in the proposed unit. (HO at 8.) A review of the hearing transcript establishes that the Hearing Officer made this finding based on the testimony of a lead CSR. The lead CSR testified that \$450 represented about a week and a half, to two weeks of her own wages. (Tr. 34.) The record evidence does not contain much payroll information about this lead CSR, including whether she was paid a fixed salary or by the hour; and if she was paid by the hour, the record lacked evidence as to how many hours she worked per week, let alone whether she was a full-time or part-time employee. Because there is insufficient payroll information about this lead CSR and about other employees for that matter, and because the witness testified that the amount represented a week and a half to two weeks of her *own* wages and not of other employees, I find in agreement with the Employer’s Exception 2 that there is insufficient evidence to support the finding that the \$450 Visa gift card represented a week and half to two weeks of wages for *all* of the employees in the unit.

⁷ There is insufficient evidence to establish how an individual employed by the Employer may be eligible to compete in the “ambassador club” contest or the criteria involved to award such prizes.

competitions and prizes, the store involved in this matter was the only store where the Employer conducted a raffle based on employees correctly answering a quiz about unions.

As an initial matter, I agree with the Hearing Officer that the Employer's raffle was not per se objectionable, as it was not conducted within 24 hours of the scheduled opening of the polls. See *Atlantic Limousine*, 331 NLRB at 1025. However, the Employer excepts to the Hearing Officer's finding that the Employer's raffle prize constituted an objectionable grant of benefits. In doing so, the Employer argues that the Hearing Officer should not have applied the Board's analytical framework set forth in *B & D Plastics, Inc.*, 302 NLRB 245 (1991), which is normally applied to pre-election grant-of-benefit cases, because the Employer had a company policy or pattern of granting incentives like the raffle prize involved in this matter.

I agree with the Hearing Officer's application of the *B & D Plastics* framework as the Employer's raffle was conducted outside the 24-hour period. In so finding, I rely on *Atlantic Limousine*, supra, where the Board held that raffles held earlier in the election campaign - outside the 24-hour period - would raise issues of whether they involve promises or grants of benefits that would improperly affect free choice; or whether they allow the employer to identify employees' sympathies towards representation. Id. at 1029, fn. 13. Since the Board's decision in *Atlantic Limousine*, the Board has applied the *B & D Plastics* framework in cases involving pre-election raffles, much like the Employer's raffle here. See, e.g., *Valmet, Inc.*, 367 NLRB No. 84, slip op. (Feb. 4, 2019) (Board applied the *B & D Plastics* framework to conduct that is similar to the Employer's raffle here, albeit the employer there announced the raffle before the election and awarded the benefit after the election was held. Thus, the raffle was an offer of a benefit.); see also *BFI Waste Systems*, 334 NLRB at 934-937 (Board applied the *B & D Plastics* framework to the employer's pre-election raffle conducted before the 24-period).

To determine whether a raffle involves a promise or grant of benefit that would improperly affect employees' free choice, the Board applies an objective standard under which it examines several factors, including "(1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees would view the purpose of the benefit; and (4) the timing of the benefit." *B & D Plastics*, 302 NLRB at 245. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. Id. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant of such benefits. Id. (citations omitted).

The Employer's argument in support of its exception that the Employer has given prizes to employees relates to a defense that may be presented under the *B & D Plastics* framework. As the Board stated in *BFI Waste Systems*, an employer may raise as a defense to its challenged conduct that the "increase in benefits is part of an established company policy or pattern" 334 NLRB at 936. (citing *Northern Telecom, Inc.*, 233 NLRB 1104, 1105 (1977)). The same Board also stated that as an additional defense, if an employer "com[es] forward with an explanation, other than the pending election, for the timing of the grant of benefit," then a grant of benefit during the critical period is not objectionable. Ibid. In other words, if the Employer's conduct is arguably objectionable under the *B & D Plastics* framework, the Employer may nevertheless establish that the benefit promised or conferred is not objectionable by establishing

that it was either part of an established company policy or pattern, or by coming forward with an explanation for the timing of the grant of benefit other than the pending election.

The Employer excepts to the Hearing Officer's finding that the total value of the raffle prize (a \$450 gift card) was substantial. In so arguing, the Employer relies on Board precedent where the Board found that pre-election raffle prizes of a higher value than \$450 were not found substantial or objectionable. See, e.g., *Sony Corp. of America*, 313 NLRB 420, 420-421 (1993) (a television set and Discman valued approximately \$1300 and \$280-300, respectively, was not substantial), overruled in relevant part by *Atlantic Limousine*, 331 NLRB at 1029 fn. 13; *American Induction Heating Corp.*, 221 NLRB 180, 180-181 (1975) (raffle of television set not objectionable); *Tunica Mfg. Co., Inc.*, 183 NLRB 729, 743 (1970) (raffle of color television set, then valued at \$350-\$400, not objectionable). However, in these cases, the Board did not apply the *B & D Plastics* framework to find the raffle unobjectionable. The Employer further argues that the \$450 raffle prize is far less than the value of the televisions raffled in *BFI Waste Systems*, (total value of \$850 for five television sets) which the Board found was substantial. 334 NLRB at 935. Finally, the Employer contends that the raffle prize of \$450 is far less than the \$500 incentives it awards pursuant to its sales competitions. In light of this Board precedent, along with the Employer's sales competitions and the impact of inflation on the prize values in prior Board decisions, the Employer contends that the \$450 raffle prize was not so substantial and, therefore, the first factor should be considered against a finding of objectionable conduct.

The prizes raffled in the Board cases relied on by the Employer, however, are different than the raffle prize involved here. Those cases involved objects, primarily television or television sets, whereas the raffle prize involved here is a Visa gift card worth \$450 that is used much like cash. Recently, in *Valmet*, 367 NLRB slip op. at 2-5, the Board held that the employer's holding of a raffle was objectionable under the *B & D Plastics*. The Board found that the promised benefits worth \$450 and \$900, a total of \$1350 in cash giveaways, were substantial. *Id.* slip op. at 4.

I agree with the Hearing Officer that the Employer's raffle prize of a Visa card valued at \$450 is substantial. First, I note that the Employer has not provided a reason for the *size* of the benefit. Although the value of the Employer's raffle is less than the total cash giveaways awarded in *Valmet* and is also valued less than the highest (\$500) cash incentives that the Employer awards as part of its quarterly sales competition, the raffle prize's value here is substantial in relation to the stated purpose for granting it. Unlike the Employer's quarterly sales competition in which employees must compete with other employees to receive *a range* of incentive awards, from \$50 to \$500,⁸ the six petitioned-for unit employees were eligible to enter into the raffle to win the \$450 gift card. The stated purpose for the contest and raffle prize—to make sure employees were fully informed about the campaign by selecting answers that were consistent with the Employer's position—could have been achieved without the sizeable monetary prize. Finally, a careful reading of *Valmet* suggests that the Board considered the \$450 cash award there, on its own, to be a substantial benefit. 367 NLRB slip op. at 4. Based on the

⁸ The record does not disclose the number and value of awards granted to employees at the petitioned-for location or at any other stores pursuant to the incentive program. Thus, it is unknown what amounts may have been awarded to unit employees under that program.

foregoing, I find that this factor weighs in favor of finding that the raffle was an objectional grant of a benefit.

As to the second factor - the number of employees receiving the benefit - although only one employee received the prize, the Board considers who had the *opportunity to compete* for those prizes. See, e.g., *Valmet*, 367 NLRB slip op. at 4. Here, every employee in the small unit (six voters) was given the opportunity to compete for the \$450 Visa gift card. Thus, in accordance with Board law, the second factor weighs in favor of a finding of objectionable conduct.

As to the third factor - how employees would view the purpose of the benefit - I find that employees would reasonably have viewed the raffle as intending to influence their votes in the upcoming election. It is clear that the purpose of the raffle was tied to the election. Employees would have, therefore, reasonably surmised that the program was limited to their store and would be aware that the award was closer in value to the higher-end awards granted as part of the Employer's quarterly sales competition.

Finally, as to the timing of the benefit, the raffle was announced a week before the election and was conducted barely outside the per se objectionable 24-hour period. Thus, the close proximity of the raffle to the election also weighs in favor of an objectionable grant of benefit.⁹

With the *B & D* factors weighing in favor of a finding of objectionable conduct, I find that the Employer has not established a sufficient defense to the challenged conduct. First, I find that the record does not demonstrate that the Employer's union quiz and raffle prize are part of an established company policy or pattern. Specifically, there is insufficient record evidence that the Employer has previously held similar contests in the form of a quiz and related raffle prize at the store involved in this matter or at any other store. *BFI Waste Systems*, 334 NLRB at 936. Thus, the Employer's reliance on *Chicago Television News, Inc.*, 328 NLRB 367 (1999) is misplaced. In *Chicago Television News*, the Board held that an employer's holding of a party where food and drink was provided, costing about \$2200 or \$26 per attendee, held the day before the election, was not objectionable. In so holding, the Board applied the *B & D Plastics* framework and noted that there was no electioneering at the party and that the employer had a history of hosting holiday parties, summer picnics, and awards for dinners to employees, and that those parties, like the party at issue in that case, was open to unit and non-unit employees. Thus, the party was similar in character to prior events.

In this case, the Employer awards \$50-\$500 prizes to employees on a quarterly basis. The record establishes that the prizes are awarded as part of a sales competition in which *all* CSRs are eligible to compete against each other to win an award by selling the most of an identified product. Although the record evidence is unclear whether the CSRs compete against employees

⁹ In agreement with the Employer's Exception 4, however, I do not rely on the Hearing Officer's drawing of an inference "that the Employer chose to hold the raffle as close as possible to the election . . . to attempt to influence the election outcome." Rather, I rely only on the fact of the timing of offer and granting of the award shortly before the election as a factor weighing in favor of a determination that the offer and granting of the raffle prize interfered with the election. Accord *B & D Plastics*, 302 NLRB at 245.

within their own stores only, or whether they also compete with employees employed at other stores, the evidence nevertheless establishes that the Employer's union quiz and raffle prize at issue gave the petitioned-for employees a distinct and new opportunity to win a cash award not regularly available to other employees. Consequently, the evidence shows that these \$50-\$500 monetary incentives are awarded to winners of contests that are of a different nature, not limited to a certain group of employees, and not related to a union election. Although the value of the raffle prize might be similar to the higher range of the sales incentives, *how* the raffle prize at issue here was awarded is starkly different than *how* the monetary incentives as part of the sales contests are awarded. Consequently, this is not a case like *Chicago Television News*, where an employer provided a benefit that was materially consistent with benefits it had awarded to all employees prior to the advent of the organizing campaign. Furthermore, because there is little evidence regarding the administration of the Employer's ambassador club, which resulted in a prize of a trip valued at approximately \$5000, the evidence regarding the "ambassador club" is also insufficient to find that such a contest was similar in character to the quiz and raffle here. In light of the foregoing, I find that the Employer's contest and raffle at issue here are not a part of an *established* company policy or pattern.

In sum, the record evidence establishes that the Employer held a competition that was different than its sales competitions, yet awarded a substantial prize valued nearly at the top of the range of prizes awarded through its quarterly sales competition. The competition was directly related to the union campaign, with the prize being available only to a small group of employees who were affected by the union campaign. Finally, the prize was awarded shortly before 24-hours of the opening of the polls. In light of these circumstances, employees would reasonably view the opportunity to win such prizes as intended to influence their votes. Therefore, I agree with the Hearing Officer's finding that the prize awarded in the raffle constituted an offer and grant of benefit that would improperly affect employee free choice.

CONCLUSION

In the absence of exceptions, I have adopted the Hearing Officer's recommendations to overrule the challenges to the ballots cast by Linda Longstrom and Mayra Canales and to overrule Petitioner's Amended Objection 3. Based on the above, and having carefully reviewed the entire record, the Hearing Officer's Report, and the Employer's exceptions and supporting brief, I am adopting the Hearing Officer's recommendation to sustain Petitioner's Amended Objection 4. Having adopted the Hearing Officer's recommendation that the challenges to the ballots cast by Linda Longstrom and Mayra Canales be overruled, I shall first direct that those ballots be opened and counted and that a Revised Tally of Ballots be issued. If the Revised Tally of Ballots shows that the Petitioner has received a majority of the ballots cast, I will take further appropriate action including issuing a certification, if appropriate. Alternatively, if the Revised Tally of Ballots shows that the Petitioner has not received a majority of the ballots cast, I shall direct a rerun of the July 31 election.

ORDER

IT IS ORDERED that the ballots of Linda Longstrom and Mayra Canales be opened and counted at a date and time to be determined by the regional director at the Denver Regional Office, Byron Rogers Federal Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294.


IT IS FURTHER ORDERED that a revised tally of ballots shall be prepared and made available to the parties.

REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision to open and count the ballots cast by Linda Longstrom and Mayra Canales and to issue a revised tally of ballots. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by February 11, 2020. Any party may file for a Request for Review with the Board of the decision on objections at any time following this decision until 14 days after a final disposition of this proceeding by the regional director. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

DATE: January 28, 2020


LETICIA PEÑA
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS
BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Circle K Stores, Inc.
Employer

and

United Food & Commercial Workers Union, Local 7, AFL-CIO,
Petitioner

Case No. 27-RC-242382

Date Issued 02/12/2020

TYPE OF ELECTION: (Check one:)

- ☐ Consent Agreement
☒ Stipulation
☐ Board Direction
☐ RD Direction

(Also check box below
where appropriate)

☐ 8(b) (7)

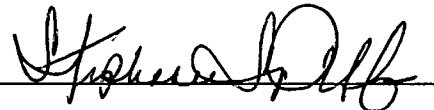
REVISED TALLY OF BALLOTS
(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the Regional Director on 1/28/2020 and the addition of these ballots to the original Tally of Ballots, executed on 07/31/2019, were as follows:

	Original Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters	6		
Number of Void ballots	0		0
Number of Votes cast for Petitioner	2		2
Number of Votes cast for XXXXXX	x		1
Number of Votes cast for XXXXXX	x		1
Number of Votes cast against participating labor organization(s)	2	2	4
Number of Valid votes counted	4		6
Number of undetermined challenged ballots	2		0
Number of Valid votes counted plus challenged ballots	6		6
Number of Sustained challenges (voters ineligible)			0

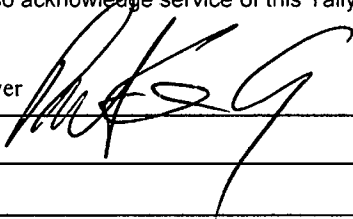
The remaining undetermined challenged ballots, if any, shown in the Final Tally column are (not) sufficient to affect the results of the election. A majority of the valid votes plus challenged ballots as shown in the Final Tally column has (not) been cast for United Food & Commercial Workers Union, Local 7, AFL-CIO

For the Regional Director

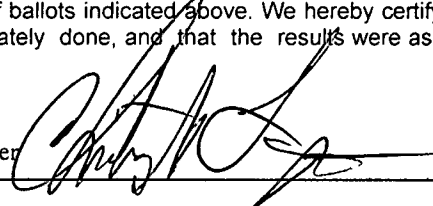


The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the Final Tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

For Employer



For Petitioner



For

For

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Circle K Stores, Inc.,

Employer

and

27-RC-242382

**United Food & Commercial Workers
Union, Local 7, AFL-CIO,**

Petitioner

Proof of Service


STATE OF MICHIGAN
COUNTY OF KENT

The undersigned certifies that on February 25, 2020, a copy of the Employer's Motion for Expedited Consideration of Request for Review & Motion to Stay Rerun Election, was served via electronic service upon the Petitioner and Regional Director at the addresses below:

Todd McNamara
General Counsel
UFCW Local 7
tmcnamara@ufcw7.com

Paula S. Sawyer
Regional Director Region 27
National Labor Relations Board
paula.sawyer@nrlrb.gov

Stephanie Scaffidi
Field Examiner, Region 27
National Labor Relations Board
Stephanie.Scaffidi@nrlrb.gov



Grant T. Pecor

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Circle K Stores, Inc.,

Employer

and

27-RC-242382

United Food & Commercial Workers
Union, Local 7, AFL-CIO,

Petitioner

Employer Motion for Expedited Consideration of Request for Review
&
Motion to Stay Rerun Election

Pursuant to the provisions of Section 102.67(j) of the Board's Rules and Regulations, the Employer, Circle K Stores, Inc., by and through its attorneys, Clark Hill, hereby motions the Board for expedited consideration of its Request for Review and/or to stay these proceedings until that Request for Review can be addressed. In support of its Motion(s), the Employer offers the following:

1. On or about May 29, 2019, the Petitioner, United Food & Commercial Workers Union, Local 7, AFL-CIO, petitioned to represent a unit of the Employer's employees at its 2709844 Store, which is located at 4020 E. 104th Avenue in Thornton, Colorado.
2. The parties entered into a Stipulated Election Agreement on or about July 16, 2019.
3. An election was held pursuant to the terms of the Stipulated Election Agreement on July 31, 2019.
4. The Petitioner filed objections to conduct they alleged affected the results of the election on or about August 7, 2019.

5. Following the Region's investigation into the conduct included in Petitioner's Objections 1 and 2 (See Case No. 27-CA-246677), the Petitioner requested to withdraw those objections and the Regional Director Ordered a hearing over the Petitioner's remaining objections
6. The Petitioner's remaining Amended Objections included the following allegations:
 - a. The Employer's observer was an individual closely identified with management (Objection 3); and
 - b. The subject matter of the Union Quiz, the disproportionate reward, which is roughly one week's salary for most Circle K employee, and the mandatory attendance at the Employer's July 29 meeting promoted an atmosphere which could reasonable (sic) have dissuaded employees from voting for Petitioner (Objection 4).
7. The Petitioner's Amended Objections did not contain any statement objecting to the conduct of the election based upon any alleged promise or grant of benefits related to an employer raffle.
8. A hearing over these allegations was held before Hearing Officer Renee C. Barker at the National Labor Relations Board Region 27 offices located at 1961 Stout Street, Room 13-103, in Denver Colorado beginning on November 21, 2019, 2019 at approximately 9:00 a.m.
9. On January 28, 2020, the Acting Regional Director for Region 27 issued a Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots.
10. As part of the January 28, 2020 Decision and Order, the Regional Director determined that
11. On February 12, 2020, the Region opened two challenged ballots resulted in a new vote count of 2 votes for the Petitioner, 4 votes against the Petitioner. *See Revised Tally of Ballots*, Case No. 27-RC-242382.
12. No objections were filed following the issuance of the Revised Tally of Ballots.

13. Since the Revised Tally of Ballots showed that the Petitioner did not receive a majority of the ballots cast, the Regional Director's Decision and Order directed a rerun of the July 31 election be held due to his decision to adopt the Hearing Officer's recommendation to sustain Petitioner's Amended Objection 4.
14. The Employer filed a Request for Review of the Regional Director's Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots on February 25, 2020 and served the Region and Petitioner that same day.
15. The Employer's Request for Review of the Regional Director's Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots seeks board review of the Regional Director's determination that the Employer's pre-election raffle was objectionable conduct requiring a rerun election.
16. The Employer seeks review of the Regional Director's Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots due Region 27 contacted the parties on February 24, 2020 to schedule a rerun election.
17. The Employer Requested Review of the Regional Director's Decision and Order Directign Count of Challenged Ballots and Issuance of Revised Tally of Ballots due of a substantial question of law or policy is raised because of: (i) The absence of; or (ii) A departure from, officially reported Board precedent; and because (4) That there are compelling reasons for reconsideration of an important Board rule or policy related to potential objectionable conduct in an representation proceeding.
18. Despite the Employer's Request for Review and the Employer's request to hold the matter in abeyance pending the Board's consideration of the Employer's Request for Review, Region 27 has indicated its intention to continue with the scheduling of a rerun election.

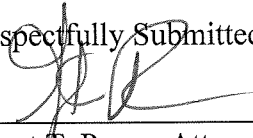
19. A second election is not appropriate if the Board grants the Employer's Request for Review and certifies the original election.
20. A second election creates the possibility of confusion given the possibility of a different result, which would only be overturned if the Employer's Request for Review is granted and the original election certified.
21. These risks are compounded by the changes in the Employer's workforce since the original election.
22. A second election poses the possibility of unnecessarily expending limited Board resources for a process that might be wholly unnecessary due to the Employer's Request for Review.
23. A second election only increases the likelihood that the Employer's operations will continue to be disrupted by representatives of the Petitioner who attempt to persuade the Employer's staff to support the Petitioner.
24. Should the Board be unable to address the Employer's Request for Review before any second election might be held, that election might only serve to undermine the ballots cast in the initial election and potentially create confusion over whether a majority of the Employer's employees desire to be represented by Petitioner for the purpose of collective bargaining despite the fact that the Petitioner was not supported by a majority of the ballots cast in the original election.
25. The current rules do not provide the Board with sufficient time for any reasonable opportunity for the Board to address and resolve the issues contained in the Employer's Request for Review.
26. Any delay posed in staying the current proceeding is outweighed by the interests of efficiency, fairness, finality and certainty that would occur if the Board were provided the

opportunity to address and resolve the issues contained in the Employer's Request for Review.

27. The processing of the instant petition was already delayed on more than one occasion due to the processing of unfair labor practice charges filed by the Petitioner that later proved to be without sufficient merit to warrant further processing and further delay would be likely only be limited to similar periods of delay caused by the Petitioner's prior requests to delay these proceedings.
28. Staying the current proceeding only confirms that the action of the Regional Director, who is a delegate of the Board, is not "Final" until the Board has the opportunity to consider the issues raised in the Employer's Request for Review to determine whether they should be vacated, and the original election results sustained.
29. Proceeding with a second election, ignores the fact that the Board may vacate or modify the Regional Director's actions and could result in an election that is a mere exercise in futility.

Wherefore, the Employer hereby motions the Board for expedited consideration of its Request for Review or, in the alternative, motions the Board to stay any rerun election until such time as it can rule upon the Employer's Request for Review.

Respectfully Submitted,



Grant T. Pecor, Attorney for Employer
Clark Hill PLC
200 Ottawa Ave NW, Ste. 500
Grand Rapids, MI 49503
(616) 608-1158
gpecor@clarkhill.com

Dated: February 25, 2020

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Circle K Stores, Inc.,

Employer

and

27-RC-242382

**United Food & Commercial Workers
Union, Local 7, AFL-CIO,**

Petitioner

Proof of Service

STATE OF MICHIGAN
COUNTY OF KENT

The undersigned certifies that on February 25, 2020, a copy of the Employer's Request for Review, was served via electronic service upon the Petitioner and Regional Director at the addresses below:

Todd McNamara
General Counsel
UFCW Local 7
tmcnamara@ufcw7.com

Paula S. Sawyer
Regional Director Region 27
National Labor Relations Board
paula.sawyer@nrlrb.gov

Stephanie Scaffidi
Field Examiner, Region 27
National Labor Relations Board
Stephanie.Scaffidi@nrlrb.gov



Grant T. Pecor

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Circle K Stores, Inc.,

Employer

and

27-RC-242382

**United Food & Commercial Workers
Union, Local 7, AFL-CIO,**

Petitioner

Employer Request for Review

Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, the Employer, Circle K Stores, Inc., by and through its attorneys, Clark Hill, hereby submits the following Request for Review of the Regional Director's January 28, 2020 Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots in the above-captioned matter. This request is based on the following compelling grounds for review: (1) a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent related to the Petitioner's Amended Objection 4 and the Employer raffle involved in the instant dispute given the Employer's undisputed history of employee competitions of this nature; and (2) there are compelling reasons for reconsideration of the Board's rule or policies regarding the future impact of prior decisions in representation cases.

I. Background

On or about May 29, 2019, the Petitioner, United Food & Commercial Workers Union, Local 7, AFL-CIO, petitioned to represent a unit of the Employer's employees at its 2709844

Store, which is located at 4020 E. 104th Avenue in Thornton, Colorado. Thereafter¹, the parties entered into a Stipulated Election Agreement on or about July 16, 2019. (Jt. 1²). An election was held pursuant to the terms of the Stipulated Election Agreement on July 31, 2019.

The Petitioner challenged two voters during the election on the basis that they were temporary employees (i.e. Linda Longstrom and Mayra Canales). In addition, the Petitioner filed objections to conduct they alleged affected the results of the election on or about August 7, 2019. Following the Region's investigation into the conduct included in Petitioner's Objections 1 and 2 (See Case No. 27-CA-246677), the Petitioner requested to withdraw those objections and the Regional Director Ordered a hearing over the Petitioner's remaining objections, which included the following allegations:

1. The Employer's observer was an individual closely identified with management; and
2. The subject matter of the Union Quiz, the disproportionate reward, which is roughly one week's salary for most Circle K employee, and the mandatory attendance at the Employer's July 29 meeting promoted an atmosphere which could reasonable (sic) have dissuaded employees from voting for Petitioner.

¹ The processing of this petition was initially blocked by the Petitioner's Charge in Case No. 27-CA-242802, which was later withdrawn.

² Parenthetical numbers preceded by the letter "T" refers to the transcript of the proceeding before Hearing Officer Renee C. Barker at the National Labor Relations Board Region 27 offices located at 1961 Stout Street, Room 13-103, in Denver Colorado beginning on November 21, 2019, 2019 at approximately 9:00 a.m. Parenthetical numbers preceded by the letters "Jt." Refers to the parties joint exhibits, "B" refers to the exhibits of the Board. Neither the Employer nor Petitioner presented any exhibits beyond the joint exhibits. Parentheticals numbers preceded by the letters "HOR" refer to pages in the Hearing Officers Report, which issued on December 13, 2019. Parentheticals numbers preceded by the letters "D&O" refer to pages in the Regional Directors Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots, which issued on January 28, 2020.

Due to the record, number of exhibits, and limited time frame allowed for the submission of briefs, any failure to cite to a specific page in the transcript should be considered a reference to the entire record. Likewise, while references to the record are meant to assist the reader in locating evidence to support an assertion contained in the brief, those references should not be construed as reference to the only places in the record where evidence supporting any assertion can be found.

A hearing over these allegations was held before Hearing Officer Renee C. Barker at the National Labor Relations Board Region 27 offices located at 1961 Stout Street, Room 13-103, in Denver Colorado beginning on November 21, 2019, 2019 at approximately 9:00 a.m.

On or about December 13, 2019, the Hearing Officers Report on Challenges and Objections issued. In doing so, the Hearing Officer recommended overruling the Petitioner's challenge to the alleged temporary employees ballots and the Petitioner's objection to the Employer's Observer. While the Hearing Officer found the Employer did not use its "Union Quizzes or the red raffle tickets to determine which employees were sympathetic to the Union," she felt that the "prize awarded in the raffle constitutes a grant of benefits that would improperly affect employees' free choice." HOR p. 10. In doing so, the Hearing Officer recommended that the ballots of the two alleged temporary employees be opened and, unless the Petitioner withdraws its objections, that the Petitioner's objection be sustained, and that the election be set aside, and a new election be directed. As a result, the Employer timely filed exceptions to the Hearing Officers findings and recommendations related to the alleged impact of the prize awarded in the raffle involved. No exceptions were filed by the Petitioner to the Hearing Officer's other findings.

Given the lack of exceptions to the Hearing Officer's findings regarding the two challenged ballots, the Regional Director adopted the Hearing Officer's recommendations overruling the objections and directed that the challenged ballots be opened and counted and that a Revised Tally of Ballots be issued. D&O p. 7. This count occurred on February 12, 2020 and resulted in a new vote count of 2 votes for the Petitioner, 4 votes against the Petitioner. *See Revised Tally of Ballots*, Case No. 27-RC-242382. No objections were filed following the issuance of the Revised Tally of Ballots. Since the Revised Tally of Ballots showed that the Petitioner did not receive a majority of the ballots cast, the Regional Director's Decision and Order directed a rerun of the July 31 election

be held due to his decision to adopt the Hearing Officer's recommendation to sustain Petitioner's Amended Objection 4, which objected to the Employer's July 29 mandatory meeting, union quiz and disproportionate reward.

The Employer now Requests Review of the Regional Director's decision regarding the Petitioner's Amended Objection 4 and his order directing a rerun election. In particular, review should be granted because the Regional Director's analysis far exceeded the Petitioner's actual objection, was inconsistent with Board precedent, and because of the ambiguities present in the Board's *B&D Plastics*, 302 NLRB 245 (1991) framework, as is demonstrated by the instant record.

Analysis

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). "As the objecting party, the Union has the burden to show by specific evidence that there has been prejudice to the election." *Sequel of New Mexico, LLC*, 361 NLRB 1124, 1125 (2014) citing *Affiliated Computer Services*, 355 NLRB 899, 900 (2010). To prevail, the Petitioner was required to establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Moreover, to meet its burden the Petitioner was required to show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged

coercive incident). In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board’s test the issue is not whether a party’s conduct in fact coerced employees, but whether the party’s misconduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election. *Baja’s Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970). However, the Regional Director’s Decision and Order in this instance sets aside the parties’ recent election despite the fact that the current record does not establish sufficient conduct to meet this *heavy* burden.

1. The Petitioner Never Objected to The Election Based on Any Alleged Objectionable Grant of Benefit.

Initially, it should not be lost that the Petitioner *never objected* to the election based upon any alleged objectionable “promise or grant of any benefit.” Rather, the Region claimed this was the Petitioner’s objection when it ordered the hearing over the Petitioner’s objections. However, while the Petitioner’s objection quoted *Atlantic Limousine*, 331 NLRB 1025 (2000) (and cited *BFI Waste Sys.*, 334 NLRB 934 (2001) in support of that quote), the Petitioner’s actual objection to the parties’ election was stated as follows:

On July 29, 2019, two days prior to the Election, *the Employer held a mandatory meeting with employees. During this meeting, the Employer gave a “Union Quiz” to employees featuring questions about the Petitioner’s efforts to organize. The Employer gave a four hundred and fifty dollar (\$450) gift card to the Employee with the most correct answers.* The Board will scrutinize an objected-to raffle, and set aside an election, if the raffle “involve[s] promises or grants of benefit that would improperly affect employee free choice; or ... allow[s] the employer to identify employees who might or might not be sympathetic, and thus learn where to direct additional pressure or campaign efforts.” *Atlantic Limousine*, 331 NLRB 1025, 165 LRRM 1001. See also *BFI Waste Sys.*, 334 NLRB 934, 174 LRRM (2002). *The subject matter of the Union Quiz, the disproportionate reward, which*

is roughly one week's salary for most Circle K employees, and the mandatory attendance promoted an atmosphere which could reasonable (sic) have dissuaded employees from voting for Petitioner.

(Petitioner Amended Objections, No. 4, p. 2)(Emphasis Added). Needless to say, although this objection involved a quote regarding employer raffles, it did not even allege the Employer held a raffle. Rather, it alleged that “[t]he Employer gave a four hundred and fifty dollar (\$450) gift card to the Employee with the most correct answers.” *Id.* As such, the issue of whether the Employer’s raffle involved any alleged improper grant of benefits was not objected to in this instance and it was improper for the Regional Director to rewrite the Petitioner’s objection in the manner that occurred in this instance.

There is no exception to the requirement that a party must raise an objection within 7 days after the tally of ballots and a party is prohibited from raising or modifying its objections after this period. *Greenville Skilled Nursing & Rehabilitation Center*, 356 NLRB 1058 (2011). Indeed, in this instance the Petitioner amended its initial Objections but never asserted that the Employer’s raffle constituted a promise or grant of benefit that improperly affected employee free choice as was reflected in the Regional Director’s initial Order Directing Hearing. As a result, the instant case should have been limited solely to the circumstances involved the Union’s actual objection and the Regional Director’s departure from the Petitioner’s actual objection should not be allowed to stand.

Contrary to the Regional Director’s Decision and Order, the Petitioner’s Amended Objection 4 did not sufficiently plead that the Employer’s raffle allegedly constituted a promise or grant of benefit during the critical period regardless of its reference to cases related to promises or granting of benefits. Indeed, any reading of the Objection confirms that its focus was on the mandatory aspect of the meeting and “Union Quiz” involved. In this regard, at a minimum, the

Board must grant review to clarify the degree of specificity required in an objection to an election and whether merely citing certain cases is sufficient for an objection to be pursued or whether a party must allege actual conduct that qualifies as objectionable under the Act.

In this regard, the Board's rules do not require citation to any prior cases. Rather, the Board's rules require objections "contain a short statement of the reasons therefor". See 29 CFR 102.69(a). However, in this instance, the short statement provided did not allege that the Employer's raffle amounted to any grant or promise of benefit. Instead, Amended Objection 4 focused purely on the atmosphere promoted by the Employer's July 29 mandatory meeting, which the Petitioner alleged could have dissuaded employees from voting for Petitioner. As such, it was improper for the Region to misrepresent the Petitioner's Objection in the manner that occurred in this instance.

In this regard, the question posed by the Petitioner's actual objection was not whether the Employer unlawfully granted any benefit via a raffle. Indeed, although citing caselaw involving raffles, the short statement included in the Objection did not even describe any raffle. Rather, the question at issue in Petitioner's Amended Objection 4 was whether atmosphere surrounding the subject matter of the "Union Quiz", disproportionate reward, and mandatory attendance involved in the Employer's July 29 employee meeting was objectionable because it could have dissuaded employees from voting for the Petitioner. Under this proper reading of the Petitioner's Amended Objection 4, no objectionable conduct was alleged and it should not have been processed to a hearing. Accordingly, the Board should not now allow the Regional Director to set aside an election based upon an objection that was never alleged, much less timely submitted. Rather, the Board should grant this request for review and order that that the prior election be certified.

2. The Employer's Raffle Was Not Objectionable Conduct.

While the Employer believes the Petitioner's Amended Objection 4 did not include any allegation that its pre-election raffle amounted to an improper promise or grant of benefit

objections, the instant election should be sustained regardless of whether that is the case. In this regard, the Regional Director's Decision and Order fails to properly take into account the nature of the prize involved and circumstances surrounding the raffle at issue, which included a history of offering similar opportunities to compete for similar prizes. T-49-50. As such, the Regional Director's Decision and Order either departed from prior Board precedent or resulted in an incorrect decision due to the absence of precedent addressing similar circumstances. At a minimum, the instance case demonstrates that there are compelling reasons for the Board to reconsider the application of its precedent to cases like that presented in this instance.

The base facts of the raffle that occurred in this instance are well-established in the instant record. Prior to the petition, the Employer had a pre-existing practice of holding store level contests during each of its 13 periods, as well as larger contests held company wide (e.g. the Ambassador club, involving trips worth thousands of dollars). T-49-50. The prizes for the contests each period ranged from \$50 to \$500, with \$500 prizes offered quarterly. *Id.*

A week prior to the election, the Employer distributed quizzes the week prior to the election with a red raffle ticket stapled to the upper right hand corner of the quiz. T-67-69. See also Jt. 3. Employees were informed that anyone turning in the quiz with 100% correct answers would be entered in a raffle for a \$450 gift card. T-29 & 67-69. However, in doing so, employees were specifically instructed that the quizzes and raffle were supposed to be anonymous, with special procedures put in place to ensure as much (e.g. quizzes would contain non-identifiable raffle ticket numbers, should not contain names or other identifying marks, and would be anonymously turned in via the store safe). T-29, 37, & 67-72. All six of the eligible voters submitted quizzes and the four entries with 100% accurate entries were included in the drawing for the gift card. Based upon those entries, the Employer held a drawing at approximately 11 a.m. on the morning of July 30,

2019 at which time it drew a raffle ticket from eligible entries and awarded a single gift card worth \$450. T-26-38 & 67-73.

In this regard, the Region properly determined that the Employer's raffle was not per se objectionable. D&O p. 4. In *New Atlantic Limousine*, 331 NLRB 1025, 1029 (2000), the Board set forth its rule prohibiting "employers and unions from conducting a raffle if (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls." In the instant case, the evidence confirmed the Employer's raffle did not violate either of these mandates. As such, there is no dispute that the Employer's raffle was consistent with the rule set forth in *New Atlantic Limousine*.

However, the Regional Director's analysis following that conclusion, is inconsistent with that required by the Board. Specifically, for raffles held outside of the 24-hour period, the Board considers whether "they involve promises or grants of benefit that would improperly affect employee free choice; or whether they allow the employer to identify employees who might or might not be sympathetic, and thus to learn were to direct additional pressure or campaign efforts." *Id.* at 1029 fn. 13 (citing *National Gypsum Co.*, 280 NLRB 1003 (1986)). In these instances, the Board applies the test set forth in *B&D Plastics*, 302 NLRB 245 (1991) (setting forth the factors the Board examines in grant-of-benefit cases). *BFI Waste Systems*, 334 NLRB 934, 935 (2001). However, as noted by the dissent in *BFI Waste Systems*, this test is not appropriate in all cases. Rather, "the Board has long held that, 'where an increase in benefits is part of an established company policy or pattern, a grant of those benefits or announcement of them prior to the election is not grounds for setting aside an election.'" *Id.* at 936 (quoting *Northern Telecom, Inc.*, 233

NLRB 1104, 1105 (1977). As such, the application of the *B&D Plastics* analysis is only appropriate where an employer does not have an established policy or pattern of granting similar benefits.

Needless to say, the present record confirms that the Employer had an established pattern of providing employees with the opportunity to compete for cash prizes that predated the instant election. In this regard, the Region committed a critical error when it failed to properly consider the impact of the Employer's history of offering similar incentives for various employee programs. For example, in *Chicagoland Television News*, 328 NLRB 367 (1999) the Board found that the employer "had a history" of sponsoring similar events. In doing so, even though it applied the *B&D Plastics* factors, the Board found this a mitigating factor that contributed to its decision that the conduct at issue was not objectionable. Indeed, even in *BFI Waste Systems*, the Board considered the fact that the employer "had never before raffled rewards of any value to its employees" in determining the circumstances in which the raffle would be perceived. *BFI Waste Systems*, *supra* at 936. See also *Valmet, Inc.*, 367 NLRB No. 84, p. 4 (2019) (noting that the lack of evidence that the Respondent had ever offered employees the opportunity to compete for similar prizes established that employees would reasonably view the raffle as intended to influence their votes). As such, there is a substantial question as to whether the *B&D Plastics* factors were appropriate in this instance, much less whether they were appropriately applied.

The Regional Director's attempts distinguish *Chicago Television News* is misplaced. Indeed, it is interesting that the Regional Director would attempt to break down the value of the party at issue in that decision (i.e. \$2200) to a per attendee cost while failing to consider such logic in the case at hand. After all, given that there was no evidence in *Chicago Television News* that employees partook in the food and drink, it was really the opportunity to participate in the event

that was the benefit at issue in that instance. However, in this instance, the Regional Director ignored the fact that only a single individual received the prize at issue and that there was no evidence even suggesting that the prize was not one of normal opportunities to compete for prizes regularly provided to employees.

Moreover, in attempting to distinguish *Chicago Television News, Inc.*, the Regional Director misses the fact that the Board has long held that, “where an increase in benefits is part of an established company policy or pattern, a grant of those benefits or announcement of them prior to the election is not grounds for setting aside an election.” *Northern Telecom, Inc.*, 233 NLRB 1104, 1105 (1977). Needless to say, the Employer’s practice of allowing employees to regularly (i.e. monthly) participate in competitions for similar cash prizes should have more than satisfied the burden of presenting evidence of such a defense in this instance. As such, the current record and the undisputed history of competitions included in that record should have confirmed that the analysis of *B&D Plastics* was not appropriate in this instance.

However, even if the *B&D Plastics* analysis was appropriate in this instance, these factors still demonstrate that the raffle in this instance was not objectionable and the Region’s analysis is not consistent with Board precedent in this area. “To determine whether a raffle involves a promise or grant of benefit that would improperly affect employees’ free choice, the Board applies an objective standard under which it examines several factors, including ‘(1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.’” *Valmet, Inc.*, supra at p. 4 (quoting *B & D Plastics*, 302 NLRB 245, 245 (1991)). Assuming this test was appropriate in this instance, the Region simply failed to appropriately apply these factors in this instance. At a minimum, the lack of precedent involving similar historical

practices likely contributed to an incorrect result. Accordingly, the Board must now protect the ballots cast in this instance by granting this Request for Review and ordering the instant election be certified.

For example, in reaching his conclusion that the raffle prize at issue in the instant case was substantial, the Regional Director argues that the Employer's prize was somehow more substantial because it involved a Visa gift card that could be used "much like cash" versus an object of equal value like a television. D&O p. 5. Needless to say, this distinction has never been made by the Board and was not appropriate in this instance. Rather, the size of the benefit remained \$450 regardless of whether it could have been spent like cash buying a television or if the prize involved was an actual television.

Similarly, the Regional Director improperly focused on the lowest prize amount in the Board's *Valmet* decision versus the total amount of the prizes involved in that decision. In doing so, the Regional Director failed to recognize that the prize in this instance (i.e. \$450) was far less significant than the \$1350 in total cash giveaways involved in *Valmet*. However, the Region ultimately provides no basis for its assertion that the \$450 prize in this instance was substantial. In fact, a review of relevant Board decisions confirms this amount is well within the value of prizes previously found by the Board to have not impacted prior elections.³ Indeed, this is especially true when inflation is considered upon the value of prior prizes is considered. In this regard, the \$450 gift card is similar or less than the value of prizes previously found permissible by the Board. *See, e.g., Sony*, 313 NLRB 420, 420-21 (1993) (holding raffle of television set then valued at \$1300

³ The Region asserts that the analysis of these decisions is somehow no longer appropriate in this instance because the decisions did not apply *B&D Plastics*. However, that fact does not change the fact that the Board in these decisions did consider whether the prizes involved were of sufficient value to be substantial and, therefore, objectionable. At a minimum, these cases are providing employers guidance on the threshold values at which types of prizes or campaign materials might be considered objectionable. As such, these decisions should still provide insight into what is a prize of sufficient value to be considered substantial now given that the Board has never overruled the analysis presented in these decisions regarding the substantial nature of the prizes involved.

and a discman then valued at \$280 were not so substantial as to warrant a new election); *American Induction Heating*, 221 NLRB 180 (1975) (raffle of television set not objectionable), and *Tunica Mfg. Co.*, 182 NLRB 729, 743 (1970) (raffle of color television set, then valued at \$350-\$400, not objectionable).⁴ Needless to say, the \$450 raffle prize in this instance is far less than the \$890 in raffle prizes involved in *BFI Waste Systems*, which adjusted for inflation would be worth \$1,285.04 in 2019.⁵ It is also less than half of the value of the total prizes offered in *Valmet, Inc.*, and half of the largest prize offered in that decision. As such, the potential reward in this instance for participating in the Employer's raffle is far less than those involved in prior Board decisions.

It should also not be lost that the prize in this instance is also undisputedly less than the \$500 prizes offered quarterly by the Employer, much less the larger incentive programs employees might be eligible for. T-50. As such, the Regional Director's assertion that the prize in this instance was "substantial" does not appear supported by the record or consistent with prior Board decisions in this area. Indeed, this prize would more likely be considered "normal" given the employer's historical practices and the significantly larger prizes that employees might also be eligible to compete for. However, the value of the Employer's normal competition prizes was not considered in determining whether the prize in this instance would be viewed as substantial. As such, at a minimum, this case demonstrates the need for the Board to establish better guidance on what prizes might be considered to be of sufficient value for the Board to consider it to be substantial enough to impact an election and the role historical practices might play in that analysis. Either way, given the undisputed evidence of similar competitions held by the Employer and the impact of inflation

⁴ In fact, when adopting the 24-hour rule for raffles in *Atlantic Limousine, Inc.*, *supra* at 1025, the Board never once criticized the Regional Director's determination that the TV/VCR (then valued at \$350 but equal to \$522.47 in 2019) was not so substantial that it diverted attention away from the election or its purpose inherently induced voters to support the Employer's position despite a litany of discussion regarding the value of raffle prizes.

⁵ Annual inflation over this period was 2.06%.

on the prize values in prior Board decisions, this first factor arguably should have been considered strongly against a finding of objectionable conduct.

The Regional Director also failed to recognize that the Employer's asserted purpose for granting holding the competition (i.e. its efforts to get employees to obtain the information needed to successfully complete the "Union Quiz") was never demonstrated to be insufficient for its intended purpose. In fact, there is absolutely no evidence in the record that might indicate that employees would have obtained this information without a prize similar to other that offered in other similar competitions. Needless to say, absent such evidence, it was not appropriate for the Regional Director to summarily assert that the Employer's intended purpose for the contest could have been accomplished with a smaller prize, which should also have contributed against the Regional Director's findings in this area. However, instead, the Regional Director summarily assumes otherwise, despite any evidence for that assertion.

It also should not be lost that only a single individual received the alleged benefit at issue. Needless to say, given the results of the election reflected in the Revised Tally of Ballots (i.e. two (2) votes for the Petitioner and four (4) votes against) this fact should have gone strongly against a finding of objectionable conduct. In this regard, the instant case is far different than prior Board decisions where employees were not already provided the regular opportunity to compete for prizes similar to that at issue in this instance. T-49-50. For example, in both *BFI Waste Systems* and *Valmet* the Board considered the benefit conveyed as the opportunity to compete for the prize involved. However, in each of those instances, the Employer did not have any established practice offering rewards to its employees. As such, the Employer's practice in this regard should have limited the instant analysis to the single employee receiving the benefit, since all the employees

already were already eligible to receive similar rewards and regularly participate in similar contests.

Given the Employer's history in offering employees the opportunity to receive prizes of this nature, it should have been highly unlikely that employees would view the purpose of the benefit as one designed to influence their vote. By tying the opportunity to participate in the raffle to the "Union Quiz" (versus, for example, actually voting) all the Employer did was provide an incentive for employees to go out and obtain the information necessary to fill out the quiz. While this information may have related to the upcoming election, the fact remains that there is zero evidence in the record that might even insinuate that the prize was in anyway tied to how employees might vote, the Union's organizing campaign or the election. Rather, the raffle was solely tied to the successful completion of a single document (i.e. the Union Quiz) and consistent with the Employer's prior practice of regularly offering employees the opportunity to participate in similar contests. As such, it was improper for the Region to ignore the Employer's legitimate motive and prior practices in determining how the purpose of the prize might be viewed.

In fact, contrary to the analysis of the Region (R&O p. 7), there is no evidence in the record that might even insinuate that the competition and raffle held in relation to the "Union Quiz" was not one of the 12 competitions per year offered by the Employer. Absent such evidence, the current record is insufficient to assert that the instant quiz was not part of the Employer's established practice of providing 12 competitions per year. As such, the Regional Director's analysis to the contrary is simply not supported by the type of evidence necessary to support the Petitioner's burden of proof in this instance.

Lastly, while the timing of the Employer's raffle might be similar to others found objectionable by the Board (due to its being announced a week prior to the election and the raffle

that occurred a little more than a day prior to the election), the timing was also consistent with the distribution of the Union Quiz and not otherwise tied to the election. In this regard, the timing of the present raffle is distinguishable from other raffles considered by the Board. Indeed, this is especially true given that those prior decisions involved opportunities to compete for prizes that were not otherwise available to employees in those prior decisions. However, in this instance, employees were already eligible to compete for prizes greater than was available in the raffle at issue. As such, the timing of the raffle in this instance should not have been a factor to support a finding of objectionable conduct in this instance.

In fact, one need only look to the Board's analysis in *Atlantic Limosusine* to confirm that the timing of the Employer's raffle was not of the type the Board indicated would be subject to scrutiny. In that decision, while adopting its 24 hours rule for raffles, the Board only indicated that it would "look with disfavor on attempts to circumvent this rule by, for example, announcing a raffle more than 24 hours before the opening of the polls and then completing the raffle after the closing of the polls." *Atlantic Limousine, supra* at 1029. However, such circumstances are not present in the case at hand. Rather, the instant record confirms that nothing in the Employer's raffle was in any way tied to the actual election and was wholly compliant with the 24-hour period established by the Board. Moreover, the entire raffle was conducted prior to the application of the Board's rule and consistent with the distribution of the "Union Quiz" and the Employer's practice of providing "12 contests per year, at the store level for employees." (T-50). Needless to say, this evidence far outweighs any evidence that might support a finding of objectionable conduct in this instance. Accordingly, the Regional Director's finding that the timing of the raffle supported a finding of objectionable conduct should not be allowed to stand.

Rather, the evidence in the instant record creates a substantial question of whether the *B&D Plastics* analysis should have been applied to the case at hand. However, even if it were appropriately applied, the

Region's application of those factors is simply not supported by sufficient evidence to offset the evidence supporting the lawful nature of the Employer's actions. Indeed, this is especially true given the undisputed record evidence confirming the Employer's history of providing similar (and far greater) prizes and the lack of evidence distinguishing the competition at issue from those 12 regularly held competitions predating the petition in this instance. T-49-50. As such, even if the amount involved were thought to be of the size that might impact free choice, there are mitigating factors present in this instance that likely offset the impact of the amount involved and perceptions of the Employer's motivations in offering such an incentive. *See, e.g., Chicagoland Television News*, 328 NLRB 367 (2000). When this evidence is properly considered, it is even less likely that the record contains the evidence necessary to sustain an objection related to any alleged grant of a benefit during the critical period.

In short, the circumstances surrounding the Employer's raffle in this instance are not of the type the Board should find objectionable or sufficient to overturn an election. Not only did the Employer take steps to ensure the anonymity of participants, but nothing in the process limited their eligibility to their voting in the election or being at the election site on election day. In fact, nothing in the raffle had anything to do with how they might vote. There certainly was no "vote no" message included the "Union Quiz" or evidence indicating such a message was delivered during the employee meeting(s) regarding that Quiz. Rather, all facets of the instant raffle occurred outside the 24-hour period preceding the election and were solely tied to employee's successful completion of a single document (i.e. the "Union Quiz"). Given that the amount involved was less in amount to those amounts regularly offered to employees during prior employee contests and not so large that it drew attention away from the election or likely induce employees into opposing the Petitioner, there is simply not sufficient evidence to support a finding of objectionable conduct in this instance. As such, the instant record is simply insufficient to establish a basis for overturning the instant election and the objection to the contrary must be denied. However, for that to occur, the Board must grant this Request for Review and order that the instant election be certified.

Conclusion

For the foregoing reasons, the Employer requests that the Board grant this Request for Review and confirm that the election should not be set aside in this instance. In doing so, the Board must acknowledge that the Petitioner failed to object to any alleged promise or grant of a benefit in this instance and was, thereby, precluded from objecting to the instant election on that basis. Moreover, even if such an objection were made, the amount involved in this instance was insufficient to impact employee choice. In addition, the impact of the Employer's raffle was likely off-set by the Employer's history of providing similar incentives. The single individual receiving the single person receiving the prize in this instance is not sufficient to impact the results of the election given that the election was decided by a 4 to 2 vote. As such, the Board must confirm that the current record is not sufficient to justify overturning the election in this instance. Rather, the Board should grant this Request for Review and order that the instant election results be certified.

Respectfully Submitted,



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Dated: February 25, 2020



United States of America
National Labor Relations Board



NOTICE OF SECOND ELECTION

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.



**United States of America
National Labor Relations Board**



NOTICE OF SECOND ELECTION

The election conducted on July 31, 2019 was set aside because the Regional Director for Region 27 of the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, new elections will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

All full-time and regular part-time customer service representatives and lead customer service representatives employed by the Employer at its Store No. 2709844, which is located at 4020 E. 104th Ave., Thornton, Colorado 80241, who were employed by the Employer during the payroll period ending February 28, 2020.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Store managers, assistant store managers, office clerical employees, professional employees, contracted employees, temporary employees, salaried employees, guards and supervisors, as defined in the Act.

DATE, TIME AND PLACE OF ELECTION

Wednesday, March 18, 2020	1:30 p.m. - 2:30 p.m.	In the Store Room located in Store No. 2709844 at 4020 E. 104th Ave., Thornton, CO 80241 4020 E 104th Avenue, Thornton, CO
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United States of America
National Labor Relations Board



NOTICE OF SECOND ELECTION

EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

	<p>UNITED STATES OF AMERICA National Labor Relations Board 27-RC-242382 OFFICIAL SECRET BALLOT For certain employees of CIRCLE K STORES, INC.</p>	
<p>Do you wish to be represented for purposes of collective bargaining by UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 7, AFL-CIO?</p>		
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>		
<p>YES</p> <div data-bbox="321 1150 457 1247"><input type="checkbox"/></div>		<p>NO</p> <div data-bbox="971 1150 1107 1247"><input type="checkbox"/></div>
<p>DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one. The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		



United States of America
National Labor Relations Board



NOTICE OF SECOND ELECTION

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (303)844-3551 or visit the NLRB website www.nlrb.gov for assistance.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
INSTRUCTIONS TO ELECTION OBSERVERS

The role of observers in an NLRB election is an important one. You are here to see that the election is conducted in a fair and impartial manner, so that each eligible voter has a fair and equal opportunity to express him or herself freely and in secret. As official representatives of the parties in this election, you should undertake your role with a fair and open mind. Conduct yourself so that no one can find fault with your actions during the election. The NLRB appreciates your assistance in this democratic process.

PRINCIPAL FUNCTIONS

- Monitor the election process.
- Help identify voters.
- Challenge voters and ballots.
- Assist Board Agent in the conduct of election.

DUTIES

- BE ON TIME: Observers should report one-half hour before the polls open.
- Identify voters.
- Check off the name of the person seeking to vote. One check before the voter's name is made by one party's observer. One check after the name is made by the other party's observer.
- See that only one voter occupies a booth at any one time.
- See that each voter deposits the ballot in the ballot box.
- See that each voter leaves the voting area immediately after depositing the ballot.
- Report any conflict regarding an individual's right to vote to the Board Agent at your table before the individual votes.
- Challenge of Voters: An observer has the right to challenge a voter for cause. A Board Agent may also question the eligibility of a voter. Any challenge must be made before the voter's ballot has been placed in the ballot box.
- Report any unusual activity to the Board Agent as soon as you notice it.
- Wear your observer badge at all times during the election.
- Remain in the voting place until all ballots are counted in order to check on the fairness of the count. If the ballots are not counted immediately after the polls close, you will be informed as to when and where the ballots will be counted.

DO NOT

- Keep any list of individuals who have or have not voted.
- Talk to any voter waiting in line to vote, except as instructed by the Board Agent. (Greeting voters as they approach to vote is acceptable.)

- Give any help to any voter. Only a Board Agent can assist the voter.
- Electioneer at any place during the hours of the election.
- Discuss or argue about the election.
- Leave the election area without the Board Agent's permission.
- Use any electronic device including cell phones, laptop computers, personal digital assistants (PDAs), mobile e-mail devices, wired or wireless data transmission and recording devices, etc. (Please turn off or disable these devices before entering the polling area).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CIRCLE K STORES, INC.
Employer

and

Case 27-RC-242382

UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots is denied as it raises no substantial issues warranting review.¹ The Employer's request for extraordinary relief is denied as moot.

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., March 5, 2020.

¹ In denying review, we emphasize that the raffle at issue in this case granted a \$450 prize that was expressly tied to employees' participation in a "union quiz" that was promulgated by the Employer as part of its pre-election campaign and conducted during the week immediately prior to the election. All employees had the opportunity to compete for this prize, and there is no evidence that the Employer has ever conducted such "union quizzes" in the past. While the Employer has conducted other types of contests, such as sales contests, at its stores, this fact does not establish that union-related quizzes were either part of an established company policy or pattern, nor does it provide an explanation, other than the timing of the election, for the timing of the grant of this benefit, which, unlike the sales contests, was expressly related to the election. See *BFI Waste Systems*, 334 NLRB 934, 936 and fn. 8 (2001).



United States of America
National Labor Relations Board



NOTICE OF SECOND ELECTION

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. DO NOT SIGN YOUR BALLOT. Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. DO NOT SIGN YOUR BALLOT. Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.



United States of America
National Labor Relations Board



NOTICE OF SECOND ELECTION

The election conducted on July 31, 2019 was set aside because the Regional Director for Region 27 of the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, new elections will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

All full-time and regular part-time customer service representatives and lead customer service representatives employed by the Employer at its Store No. 2709844, which is located at 4020 E. 104th Ave., Thornton, Colorado 80241, who were employed by the Employer during the payroll period ending February 28, 2020.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Store managers, assistant store managers, office clerical employees, professional employees, contracted employees, temporary employees, salaried employees, guards and supervisors, as defined in the Act.

DATE, TIME AND PLACE OF ELECTION

Wednesday, March 18, 2020	1:30 p.m. - 2:30 p.m.	In the Store Room located in Store No. 2709844 at 4020 E. 104th Ave., Thornton, CO 80241 4020 E 104th Avenue, Thornton, CO
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United States of America
National Labor Relations Board



NOTICE OF SECOND ELECTION

EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.



UNITED STATES OF AMERICA
National Labor Relations Board

27-RC-242382



OFFICIAL SECRET BALLOT

For certain employees of
CIRCLE K STORES, INC.

Do you wish to be represented for purposes of collective bargaining by
**UNITED FOOD & COMMERCIAL WORKERS UNION,
LOCAL 7, AFL-CIO?**

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES

☐

sample

NO

☐

DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box.

If you spoil this ballot, return it to the Board Agent for a new one.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.



United States of America
National Labor Relations Board

NOTICE OF SECOND ELECTION



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (303)844-3551 or visit the NLRB website www.nlr.gov for assistance.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

CIRCLE K STORES, INC.

Employer

and

Case 27-RC-242382

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO**

Petitioner

ORDER DIRECTING SECOND ELECTION AND NOTICE OF SECOND ELECTION

Pursuant to the provisions of a Stipulated Election Agreement, an election was conducted on **July 31, 2019** among a unit of all full-time and regular part-time customer service representatives (CSR) and lead CSRs employed by the Employer at its Store No. 2709844, located in Thornton, Colorado. The original tally of ballots shows that of the six eligible voters, two cast votes for the Petitioner, two cast votes against the Petitioner, and there were two challenged ballots, which were determinative

The Petitioner subsequently filed timely objections to conduct affecting the results of the election. Following a hearing, the Hearing Officer issued a report recommending that the challenged ballots be opened and counted. The Hearing Officer also recommended that, if the revised tally of ballots shows that a majority of votes was not cast for the Petitioner, then the election held on July 31, 2019 should be set aside and that a second election be directed in view of the recommendation that Amended Objection 4 regarding the Employer's award of a raffle prize be sustained.

The Employer filed exceptions to the Hearing Officer's Report on Challenges and Objections, and, on January 28, 2020, the Regional Director issued her Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots, in which she agreed with the Hearing Officer's recommendations.

The challenged ballots were opened and counted, and a revised tally of ballots issued on February 12, 2020. A majority of the votes was not cast for the Petitioner.

DIRECTION OF SECOND ELECTION

As previously concluded, as a majority of the votes was not cast for the Petitioner, **IT IS HEREBY ORDERED** that the July 31, 2019 election is set aside and a second secret ballot election will be conducted among the employees in the same unit as in the first election. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food & Commercial Workers Union, Local 7, AFL-CIO. The date, time

and place of the election are specified in the attached Notice of Second Election, which also contains the following language:

NOTICE TO ALL VOTERS

The election conducted on July 31, 2019 was set aside because the Regional Director for Region 27 of the National Labor Relations Board found that certain conduct by the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Second Election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Eligible to vote in the second election are those employees in the unit who were employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the date of the first election, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced.

Voter List

The employer must provide the regional director and parties named in the decision an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters, accompanied by a certificate of service on all parties. When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties.

To be timely filed and served, the list must be *received* by the regional director and the parties by **March 9, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.** The employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not

object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure.

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Notice Posting

The Employer must post copies of the Notice of Second Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. on the day of the election and must also distribute the Notice of Election electronically to any employees in the unit with whom it customarily communicates electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. on March 13, 2020**. The Employer's failure to timely post or distribute the election notices is grounds for setting aside the election if proper and timely objections are filed. However, a party is stopped from objecting to the nonposting or nondistribution of notices if it is responsible for the nonposting or nondistribution.

Paula S. Sawyer

Dated: March 5, 2020

PAULA S. SAWYER
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

CIRCLE K STORES, INC.

Employer

and

Case 27-RC-242382

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO**

Petitioner

ORDER POSTPONING ELECTION INDEFINITELY

Given the current situation, the Regional Director is postponing the second election scheduled for March 18, 2020 indefinitely. We will contact the parties in the near future before the second election is rescheduled.

The Employer should post this order next to all Notices of Second Election that were previously posted.

Dated: March 17, 2020

/s/ Paula Sawyer

PAULA S. SAWYER
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

CIRCLE K STORES, INC.

Employer

and

Case 27-RC-242382

**UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 7, AFL-CIO**

Petitioner

ORDER RESCHEDULING SECOND ELECTION

Pursuant to the provisions of a Stipulated Election Agreement, an election was conducted on July 31, 2019 among a unit of all full-time and regular part-time customer service representatives (CSR) and lead CSRs employed by the Employer at its Store No. 2709844, located in Thornton, Colorado. The original tally of ballots shows that of the six eligible voters, two cast votes for the Petitioner, two cast votes against the Petitioner, and there were two challenged ballots, which were determinative.

The Petitioner subsequently filed timely objections to conduct affecting the results of the election. Following a hearing, the Hearing Officer issued a report recommending that the challenged ballots be opened and counted. The Hearing Officer also recommended that if the revised tally of ballots shows that a majority of votes was not cast for the Petitioner, then the election held on July 31, 2019 should be set aside and that a second election be directed in view of the recommendation that Amended Objection 4 be sustained.

The Employer filed exceptions to the Hearing Officer's Report on Challenges and Objections, and, on January 28, 2020, the undersigned issued a Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots, agreeing with the Hearing Officer's recommendations.

On February 12, 2020, the challenged ballots were opened and counted, and a revised tally of ballots was issued. A majority of the votes was not cast for the Petitioner.

On February 25, 2020, the Employer filed a Request for Review to the Regional Director's Decision and Order Directing Count of Challenged Ballots and Issuance of Revised Tally of Ballots and, on March 5, 2020, the Board denied the Employer's request.

On March 5, 2020, an Order Directing Second Election and Notice of Second Election issued scheduling a second manual election for March 18, 2020.

Thereafter, due to the circumstances related to COVID-19, the Board suspended all representation elections. Accordingly, on March 17, 2020, an Order Postponing Election Indefinitely issued in this matter.

Effective April 6, 2020, the Board lifted its temporary suspension of all representation elections.

The parties have indicated their agreement to conducting the rescheduled second election by mail ballot as described below. Accordingly,

ORDER

IT IS ORDERED that the second election directed in the March 5, 2020 Order Directing Second Election is rescheduled to be conducted by mail ballot as follows:

METHOD AND DATE OF ELECTION

The second election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 3 p.m. on **Tuesday, April 21, 2020**, ballots will be mailed to voters from the National Labor Relations Board, Region 27, 1961 Stout St., Suite 13-103, Denver, Colorado 80294. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by April 29, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 27 Office at 303-844-3551 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

In order to be valid and counted, the returned ballots must be received in the Region 27 Office by Friday, May 8, 2020 at 5 p.m. All ballots will be commingled and counted at the Region 27 Office on Monday, May 11, 2020, at 10 a.m. ¹

The Notice of Rescheduled Second Election shall also contain the following language:

NOTICE TO ALL VOTERS

The election conducted on July 31, 2019 was set aside because the Regional Director for Region 27 of the National Labor Relations Board found that certain conduct by the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a second election was scheduled to take place on March 18, 2020. That election was postponed as a result of the National Labor Relations Board's announcement to suspend representation proceedings due to

¹ Inasmuch as circumstances relating to the current pandemic may not allow for the presence of the parties at the Regional Office on the scheduled date for the ballot count, after communication with the parties I will determine the method of party participation, including by electronic means, shortly before the scheduled count.

current circumstances. The second election is being rescheduled to take place by mail pursuant to the details specified in this notice. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Eligible to vote in the second election are those employees in the unit who were employed during the payroll period ending **February 28, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the date of the first election, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced.

Voter List

Pursuant to Section 11312.1(j) of the casehandling manual, the voter list to be used in the rescheduled second election ordered herein is the list the Employer previously provided as required under the terms of the March 5, 2020 Order Directing Second Election.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Notice Posting

The Employer must post copies of the Notice of Rescheduled Second Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. on the day of the election and must also distribute the Notice of Election electronically to any employees in the unit with whom it customarily communicates electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. on April 16, 2020**. The Employer's failure to timely post or distribute the

election notices is grounds for setting aside the election if proper and timely objections are filed. However, a party is stopped from objecting to the nonposting or nondistribution of notices if it is responsible for the nonposting or nondistribution.

Dated: April 14, 2020

/s/ **Paula S. Sawyer**

PAULA SAWYER
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294



United States of America
National Labor Relations Board



NOTICE OF RESCHEDULED SECOND ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. **At 3 p.m. on Tuesday, April 21, 2020** ballots will be mailed to voters from the National Labor Relations Board, Region 27, 1961 Stout St., Suite 13-103, Denver, Colorado 80294. Voters must sign the outside of the envelope in which the ballot is returned. **Any ballot received in an envelope that is not signed will be automatically void.**

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **April 29, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 27 Office at 303-844-3551 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

In order to be valid and counted, the returned ballots must be received in the Region 27 Office by Friday, **May 8, 2020 at 5 p.m.** All ballots will be commingled and counted at the Region 27 Office on Monday, May 11, 2020, at 10 a.m.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.



**United States of America
National Labor Relations Board**

NOTICE OF RESCHEDULED SECOND ELECTION



NOTICE TO ALL VOTERS

The election conducted on July 31, 2019 was set aside because the Regional Director for Region 27 of the National Labor Relations board found that certain conduct by the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a second election was scheduled to take place on March 18, 2020. That election was postponed as a result of the National Labor Relations Board's announcement to suspend representation proceedings due to current circumstances. The second election is being rescheduled to take place by mail pursuant to the details specified in this notice. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

All full-time and regular part-time customer service representatives and lead customer service representatives employed by the Employer at its Store No. 2709844, which is located at 4020 E. 104th Ave., Thornton, Colorado 80241, who were employed by the Employer during the payroll period ending February 28, 2020.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Store managers, assistant store managers, office clerical employees, professional employees, contracted employees, temporary employees, salaried employees, guards and supervisors, as defined in the Act.



United States of America
National Labor Relations Board

**NOTICE OF RESCHEDULED
SECOND ELECTION**



**UNITED STATES OF AMERICA
National Labor Relations Board**

27-RC-242382

OFFICIAL SECRET BALLOT

For certain employees of
CIRCLE K STORES, INC.



Do you wish to be represented for purposes of collective bargaining by
**UNITED FOOD & COMMERCIAL WORKERS UNION,
LOCAL 7, AFL-CIO?**

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES

☐

NO

☐

DO NOT SIGN THIS BALLOT. See enclosed instructions.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.



United States of America
National Labor Relations Board
**NOTICE OF RESCHEDULED
SECOND ELECTION**



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (303)844-3551 or visit the NLRB website www.nlrb.gov for assistance.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

Circle K Stores, Inc.

Employer

and

Case 27-RC-242382

**United Food & Commercial Workers Union, Local 7,
AFL-CIO**

Petitioner

TYPE OF ELECTION: Directed (Second Election)

CERTIFICATION OF RESULTS OF ELECTION

A second election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has not been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board,

It is certified that a majority of the valid ballots has not been cast for any labor organization and that no labor organization is the exclusive representative of the employees in the bargaining unit described below.

Unit:

Included: All full-time and regular part-time customer service representatives and lead customer service representatives employed by the Employer at its Store No. 2709844, which is located at 4020 E. 104th Ave., Thornton, Colorado 80241.

Excluded: Store managers, assistant store managers, office clerical employees, professional employees, contracted employees, temporary employees, salaried employees, guards and supervisors, as defined in the Act.



May 20, 2020

/s/ *Paula S. Sawyer*

PAULA S. SAWYER
Regional Director, Region 27
National Labor Relations Board